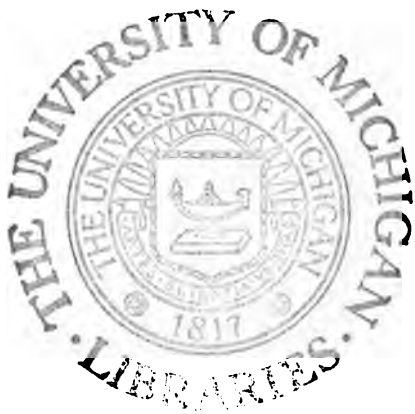
THE UNIVERSITY OF MICHIGAN
THE UNIVERSITY OF MICHIGAN
1817
LIBRARIES

POPULAR GOVERNMENT

The Citizen's Library of Economics, Politics and Sociology

EDITED BY

RICHARD T. ELY, Ph. D., LL. D.

Professor of Economics in the University of Wisconsin

NEW SERIES

THE PROGRESSIVE MOVEMENT. By Benjamin P. DeWitt, M. A., LL. B.

THE SOCIAL PROBLEM. By Charles A. Ellwood, Ph. D.

THE WEALTH AND INCOME OF THE PEOPLE OF THE UNITED STATES. By Willford I. King, Ph. D.

THE FOUNDATIONS OF NATIONAL PROSPERITY. By Richard T. Ely, Ph. D., LL. D.; Ralph H. Hess, Ph. D.; Charles K. Leith, Ph. D.; Thomas Nixon Carver, Ph. D., LL. D.

THE WORLD WAR AND LEADERSHIP IN A DEMOCRACY. By Richard T. Ely, Ph. D., LL. D.

BUDGET MAKING IN A DEMOCRACY. By Major Edward A. Fitzpatrick.

THE VISION FOR WHICH WE FOUGHT. By A. M. Simons, B. L.

CITY MANAGER IN DAYTON. By Chester E. Richtor, B. A.

THE MARKETING OF WHOLE MILK. By Henry E. Erdman, Ph. D.

THE NON-PARTISAN LEAGUE. By Andrew A. Bruce, LL. B.

POPULAR GOVERNMENT. By Arnold B. Hall, B.A., J. D.

POPULAR GOVERNMENT

An Inquiry into the Nature and Methods of Representative Government

BY

ARNOLD BENNETT HALL, J. D.
of the Faculties of
Political Science and Law
of the
University of Wisconsin

New York
THE MACMILLAN COMPANY
1921

Set up and electrotyped Published June, 1921.

Printed in the United States of America.

PREFACE

AT a time when our institutions are being subjected to criticism and contempt, when the necessity for greater technical efficiency goes hand in hand with the increasing and restless demand for greater popular control, and when the fundamental theories of our government are menaced by a national myopia of political vision induced by the pressure of immediate need, an analysis of the tested principles of our constitutional system seems very opportune. In order to make this analysis both timely and concrete, the discussion is centered around the practical political problems that have claimed public attention in recent years.

The attempt here is to inquire into the inherent nature of popular government and to determine its fundamental limitations. We are concerned only incidently with considerations of form, but primarily with the forces of human nature as they function through the forms of democracy. How must they function if they function effectively, and if popular government is to be really popular? Are there any fixed and inherent limitations upon the exercise of popular control which the architects of our political destiny dare not ignore? A consideration of these and similar questions should afford us some basis in fundamental principle for evaluating the modern tendencies in the modification of our system of representative government.

In his able and practical conception of public opinion, President Lowell has given us a very valuable concept in the study of democracy of which the author has gladly and freely availed himself, and which forms the basis of approach in the present volume. The author has no

new contribution to offer, but hopes that the analysis and discussion of political problems in the light of the fundamental principles involved may, perhaps, help to give a better perspective to the political thinking of the public and to translate its maturer thoughts into a coherent body of political convictions.

In the preparation of the bibliography, the author has received indispensable assistance from his wife. He is also under great obligation to his colleague, Mr. Graham H. Stuart, for reading and correcting the manuscript.

ARNOLD BENNETT HALL.

Madison, Wisconsin.
July 22, 1920.

POPULAR GOVERNMENT

CHAPTER I

THE NATURE OF POPULAR GOVERNMENT

POPULAR government is a practical rather than a philosophical concept. Its existence is not determined by the application of political dogmas, the constitutional organization and distribution of its powers, or the qualifications of its electors. Its existence depends ultimately upon considerations that are more permanent, organic, and psychological. In the last analysis and for all practical purposes, popular government is that form of political organization in which public opinion has control. And this means that the existence of public opinion is the prime requisite of popular government. A country may be existing under democratic forms of government, with adequate machinery for the registering of public opinion, and yet there be an utter absence of political democracy. The constitution of Mexico affords ample machinery for popular expression, and yet no one would seriously contend that it is a real democracy, for there is no public opinion to assume control.

The identification of popular government with the machinery of popular elections has been an all too common error. Democracy is not so simple as the legal devices for registering majorities or counting hands. It implies the existence of those nationalistic and psychical traits that make possible a public opinion that can and will control. The electoral devices are the mere form, while public opinion is the substance of democracy.

Where the machinery of democracy has been installed among peoples or over areas where public opinion did not exist, there have followed dictatorships, obligarchies, and despotisms under the forms of democracy. The experiences of some of the turbulent countries in the Caribbean, operating under the forms of constitutional democracy, with their succession of obligarchs and dictators, bear eloquent testimony to this fundamental truth. The reign of the "carpetbaggers" in the South, following the enfranchisement of the negro, in some cases obliterated the last vestige of democracy. It was not until the negro, deprived of his constitutional right of suffrage, was made a politically subject race, and the control of government returned to the whites, among whom a public opinion prevailed, that popular government was restored. When one of our great cities has fallen temporarily into the hands of corrupt and vicious bosses, and true democracy has seemed to disappear, it has not been due to the failure of electoral devices to register correctly the votes of citizens, but, generally, it has been due to a conspicuous lack of public opinion. The city's population has frequently been composed largely of immigrants whose traditions, aspirations, and political convictions, inherited from different and alien lands, have lacked that unity of purposes and ideals that is essential to an effective public opinion. The great significance to be attached to the work of Americanization lies just here. Unless the great mass of our people can be impregnated with a common conviction as to the purposes of government and the fundamental means of their accomplishment, popular government is imperiled. During the World War, the great menace that seemed to confront us in the beginning was the possibility that we might fail to develop a public opinion behind the objects and purposes

of the war, and that, as a consequence, our nation would divide into irreconcilable groups, none of which could permanently prevail.

It thus becomes clear that popular government cannot exist without public opinion. None of the devices of popular control can secure democracy, unless back of this machinery there is a public opinion that functions through it. On the other hand, where there is a dominant, virile public opinion, there will be some degree of popular government, though the electoral devices have not been adequately provided. The British Empire, with its hereditary monarch and its House of Lords, is nevertheless a democratic government. Nor would one question the popular nature of the government of Canada, merely because the Governor General is appointed by a Prime Minister overseas, and its senators hold office for life. Despite these factors, public opinion has worked out an effective method of expression, and democracy has been achieved.

If these observations are correct, public opinion becomes the basic conception of democracy. The problems of popular government can be approached, therefore, only through the analysis and understanding of this important concept. Moreover we must approach it from a practical rather than a philosophical point of view. We are concerned only with that public opinion which forms the basis of practical democracy. This has been most ably analyzed by President Lowell, who found the first requisite to be that the opinion must be really public. "Public opinion to be worthy of the name, to be the proper motive force in a democracy, must be really public; and popular government is based upon the assumption of a public opinion of that kind. In order that it may be public a majority is not enough, and unanimity is not required, but the opinion must be such that while

the minority may not share it, they feel bound, by conviction not by fear, to accept it; and if democracy is complete the submission of the minority must be given ungrudgingly."[1]

The distinction between public opinion and popular majorities has been too rarely kept in mind, and yet it is fundamental. The credulity with which the idea of self-determination, as the means of solving the vexing problem of subject nationalities, has been generally received, is significant. It would be easy to get a majority vote among the people of Ireland, for or against Irish independence, but could it be said that such a vote solved the problem, when the minority would begin civil war against the execution of the people's mandate? A popular majority might easily have been secured by a nation-wide referendum just before the Civil War, on the question of the extension of slavery and allied issues, but would anyone argue that such a decision would have been accepted by the losing side? Would any one suppose that such a vote would have prevented the appeal to arms to settle a problem upon which a national public opinion did not then exist? The facts are that the American people had not yet developed a deep conviction as to the unquestioned rights of the majority to rule in regard to all matters falling within the constitutional scope of their powers, and, therefore, that they did not feel bound to acquiesce. The Civil War evidenced the temporary breakdown of popular government in America, due to the absence of a genuine public opinion.

The distinction between mere popular majorities and a genuine public opinion, in which the minority feels bound to acquiesce, is persuasively stated by President Lowell. "If two highwaymen meet a belated traveller

[1] *Public Opinion and Popular Government*, pp. 14-15.

on a dark road and propose to relieve him of his watch and wallet, it would clearly be an abuse of terms to say that in the assemblage on that lonely spot there was a public opinion in favor of a redistribution of property. Nor would it make any difference, for this purpose, whether there were two highwaymen and one traveller, or one robber and two victims. The absurdity in such a case of speaking about the duty of the minority to submit to the verdict of public opinion is self-evident; and it is not due to the fact that the three men on the road form part of a larger community, or that they are subject to the jurisdiction of a common government. The expression would be quite as inappropriate if no organized state existed; on a savage island, for example, where two cannibals were greedy to devour one shipwrecked mariner. In short, the three men in each of the cases supposed do not form a community that is capable of a public opinion on the question involved. May this not be equally true under an organized government, among people that are for certain purposes a community?"[1]

There can be a public opinion, therefore, only in those communities where the people have a strong sense of national unity, based upon a common conviction both as to the legitimate objects of government and the proper means of their attainment, and where they are scrupulously careful in the observance of such convictions. For it is only under these conditions that the minority will give ungrudging obedience to the dictates of the majority. If there has been any considerable number of people in Soviet Russia who were unwilling to render obedience to the mandates of the government, except as compelled to under threat of force, then there was a government by force rather than by public opinion. Nor

[1] *Ibid.*, pp. 4, 5.

would it make any difference if a majority voluntarily supported Soviet control; it would still be a government by force. It would not be a democracy in the sense that it was a government by all the people. Such could not exist until there was such a spirit of national unity that the minority would readily accept the rule of the majority.

The second essential of public opinion, according to President Lowell, is that it must be real opinion, as distinguished from "mere prejudice or meaningless impression." This does not mean that a blind prejudice, if widespread, may safely be ignored in politics, for it cannot be. It must be reckoned with, but it is not the kind of opinion which popular government is intended to express. On the other hand, a belief may be a real opinion, although not the product of the believer's intellectual processes. The old idea that man is a wholly rational being, ordering his life by intellectual processes entirely, has long since disappeared. Modern psychology has emphasized what a small part the individual's reason plays in belief and action. Convictions are more largely the product of suggestion and authority than of analysis and thought. President Lowell illustrates this by reference to religious beliefs. "The history of religious bodies shows that with the vast majority of men creeds are inherited; or, to speak more strictly, accepted on the suggestion and authority of parents and teachers. It is incredible that if every one really thought out his beliefs for himself religious lines would remain from generation to generation so little changed as they have, for example, among the Catholics and Protestants in Switzerland * * * in fact it would be safe to assert as a general rule that the members of every church have accepted its dogmas because they belonged to it, quite as

much as they have clung to the church on account of a belief in its creed. Nor is this less true of other spheres of thought. It is manifestly the case in politics, where party affiliations have no less influence in fixing the principles of men, than the principles have in determining the membership of the parties."[1]

Nevertheless, President Lowell argues convincingly, such opinion adopted from others through the process of suggestion or authority may be real opinion, if it form an integral part of the believer's philosophy. For, as experimental psychologists have shown, man cannot generally by hypnotic suggestion be made to adopt an idea inconsistent with his own character and convictions. Conversely they are especially susceptible to opinions and beliefs that are consonant with their accepted philosophies. Thus the American public opinion against polygamy in Utah was not the result of a rational study of the relative merits of polygamy and monogamy, but was rather due to the consciousness that the practice of polygamy in Utah was antagonistic to the fundamental principles of the family upon which the whole social fabric rested. Thus "when an old conviction is retained or a new one is accepted, on account of its consonance with a code of beliefs, already in the mind, although without any sufficient process of reasoning or knowledge of the facts, it may be regarded as an opinion in a very different sense from an impression derived from authority or suggestion apart from any such connection with existing ideas."[2]

While such an opinion may not be very convincing evidence as to the truth of the propositions that are involved, it is nevertheless real opinion. For the test of what constitutes real opinion is not its reliability and accu-

[1] *Ibid.*, pp. 16, 17.
[2] *Ibid.*, p. 21.

racy, but the hold it has upon the lives and thought of the people. Does it afford the continuing basis of a unified purpose and thought that will constitute the cohesive unity and the community of object that are essential to the coöperative process that we call democracy? We can have popular government only where there is real public opinion to guide and rule. / Unless this opinion is sufficiently grounded in the convictions and consciousness of the people, it will have neither the continuity essential for effective government, nor the vitality and force to make itself supreme. / Beliefs, therefore, that arise wholly from the conscious acceptance of authority or the unconscious process of suggestion are not likely to be real opinion—that is, held with sufficient firmness and conviction—unless such beliefs are right in line with the people's own established conceptions. There are many instances in Central America where dictators have aroused tremendous enthusiasm in behalf of democratic government, but it has rarely continued long enough to establish even a semblance of democracy. This popular manifestation was not real opinion, but merely a popular impression. Created by the authority and contagious personality of some dominant figure, there was no basic conviction of liberty, popular government, or orderly restraint with which the popular impression might establish a vital contact. There was no foundation of national unity, philosophy, or character upon which an enduring structure of democracy could be erected.

The nature of public opinion is well illustrated by American opinion in regard to foreign policy. The ignorance of our people regarding world politics is proverbial. We have taken the principle of isolation with such credulity and in such seriousness, that even the experiences of the great war do not seem to have shattered it materially.

We have, also, as a result of authority, suggestion, and traditional inheritance, a deep and abiding conviction as to the value of the Monroe Doctrine. This conviction is none the less firm and persistent by reason of the fact that a great majority of those who hold it could not possibly define the meaning and implications of the doctrine. As a consequence, when some new question of foreign policy arises, especially in connection with affairs of this hemisphere, the spokesmen are compelled to express it in terms of the Monroe Doctrine if they desire a popular hearing and support. This is necessary, since the great majority of our people are not sufficiently familiar with the facts to form an opinion of their own. The mere authority of our national spokesmen and popular leaders is not sufficient to create a real opinion behind the policy, unless that policy can be harmonized with the traditional doctrine of Monroe. The result is that our public men have brought in many things under this famous doctrine that have no logical or organic relation to it. Moreover, most of the public debate on new problems of foreign policy generally turn more on the question of whether it is a part of the Monroe Doctrine, than as to its ultimate wisdom and justice, although it is conceivable that the two may not be the same.

When the idea of a League of Nations began to receive popular discussion, immediately after the armistice, there was created a popular impression in its favor that seemed destined to ripen into true opinion, because it seemed to harmonize with the firmly established conviction of the American people that war is a wicked and wasteful institution, in the continuation of which we had everything to lose and nothing to gain. When President Wilson brought home the proposed covenant of the League of Nations, had the idea then received the ap-

proval of the few great leaders in each of the great political parties, as a feasible scheme for diminishing the chance of war, and one which either did not interfere with the Monroe Doctrine or which secured a better protection of those interests guarded by that doctrine, a public opinion in favor of the covenant would have been created that would have compelled the ratification of the treaty. For here the voice of authority, harmonizing with the convictions of the people, would have produced a genuine opinion that would ultimately have prevailed.

But, unfortunately for the treaty, it was the opposite that happened. There were as many differing opinions as there were prominent leaders of the people. They expressed varying convictions that ranged from the most hostile opposition to the treaty, as source of future wars rather than a guarantee of peace, to those who supported it in every detail as the only means of safeguarding America's fundamental interests. Consequently there is as yet no real public opinion upon the covenant. This is reflected in the indecision, the futile parliamentary maneuvers, and the almost hopeless impotence of the Senate's attempt to grapple with the problem. There seems to be a strong prevailing opinion that some form of international arrangement should be effected in the effort to safeguard the peace of the future, and that in such an arrangement the United States should not be asked to abandon the protection of the Monroe Doctrine. But as to whether the proposed covenant accomplishes this task, or as to what reservations or changes should be made, there seems to be an absence of well-defined opinion.

This does not mean, however, that a public opinion is impossible on this particular question. It merely means that when there is no dominant and accepted authority from which one can get one's beliefs, and where also the

relation of the various beliefs to the citizen's convictions is not clear, no opinion can be formed until the public have gone through a process of reasoning and have acquired a certain number of material facts. This process requires time. The public are generally agreed as to the desirability of peace, the necessity of some kind of international organization to secure it, and the fundamental value of the Monroe Doctrine to the peace and security of the United States. The problem is how may these general principles, upon which there is a public opinion, be applied in this particular case? Does the proposed covenant apply these principles? If not, what are the means by which these desired ends may be accomplished? This case is typical of a vast number of problems, upon which a public opinion becomes essential, but which, in the words of President Lowell, "do not present a question of harmony, with accepted principles, but the application of an accepted principle to a particular case, or the means to be adopted in attaining an end universally desired; and these things usually require for their determination a considerable knowledge of the subject matter. In short, the question turns not on the abstract fitness of things, but mainly on the verification of facts, and in doubtful cases on ascertaining facts neither on the one hand self-evident nor on the other improbable."[1]

A real opinion cannot be formed on this complicated issue, therefore, until the public have had time to do some thinking and to inform themselves farther on the facts. They must come to some conclusion as to the relation of the covenant to the essential principles of the Monroe Doctrine. They must get some idea as to the international machinery that the covenant will establish, and as to its probable effectiveness. They must gain some

[1] *Ibid.*, p. 22.

conception of the general nature of European politics, of the idea of economic imperialism, of the history of recent efforts and achievements in the solution of international controversies by arbitration, inquiry, and conference. They must know something of the great European conferences of the past, in which conflicting national interests have been adjusted, as a basis of estimating the feasibility of the proposed function of the executive council. They must know something of the liabilities that America assumes by becoming a party to the league. They must gain some conception of the extent to which America has a vital interest in the peace of the world, in order to come to some conclusion as to whether the benefits received will compensate for the liabilities assumed.

These are some of the questions which must be met. This does not mean that all of them will be decided independently. Very few persons will have the sustained interest or the historic background to follow out each of the questions suggested to an independent conclusion. Many will accept the opinion of their favorite historian, public leader, journal, newspaper, or their best informed friends on some of the aspects of the problem. From a more or less careful analysis and comparison of the conclusions, facts, and opinions thus assembled, they will arrive at some opinion of their own. And this will be real opinion by the very reason that it is, partially at least, a product of their own intellectual life. By the process of thought thus involved, the conclusion reached will tend to become a part of one's intellectual equipment, and to deepen into convictions of such strength and permanence, that it will become real opinion, as distinguished from a merely passing impression.

How mere impressions, derived from authority or suggestion, may ripen into conviction through the process of

thought is capable of abundant illustration. Very frequently a lawyer, who, upon the initial investigation of his client's claim, has considerable doubt as to its validity, loses that doubt and acquires a definite conviction as he develops his argument and builds his case. The client's point of view is reduced to terms of his own intellectual activity, he acquires an unconscious bias in its favor, and his honest doubt gives way to honest and even passionate conviction. Were he retained on the opposing side, he would reach just as clear a conviction, but to the opposite effect. Most of us can recall how some of our convictions that we hold today originated in some debate, or special paper or report, prepared in high school or in college, and which we have had no occasion to reëxamine since. The mere process of thinking it out changed our impressions into opinions that still prevail.

The efficiency of the process of reasoning in the development of conviction is well understood by those whose business it is to develop public opinion. Those religious faiths which depend upon authority for their support, and which, therefore, find it essential to establish religious education among their young, have found the catechism a very valuable device. It gives the youth a process of reasoning in favor of the established creed which tends to deepen his convictions. It may be that the reasoning proceeds upon premises that are not scientifically sound, but if sufficiently plausible to harmonize with inherited prejudice, the believer's convictions gain immeasurably by the process. This is recognized by shrewd political managers, who desire to strengthen their party membership against the dangers of political heresy. They seek to establish plausible premises and significant facts, upon which to build an affective argument as to the superiority of the party or principle they represent. Frequently this

is intended more to strengthen their own members than to win converts from the opposition. They realize that if they can lead their followers through a process of reasoning to the desired conclusion, party fidelity will be tremendously increased, even though the premises be false and the figures misleading.

The successful advertising writer employs the same psychology. He uses "reason why copy." He seeks to "sell" the reader by supplying him with a reasoned argument leading to the desired conclusion. If he can interest the reader to follow him, and the reasoning be plausible, he generally succeeds.

If a general belief is created only by suggestion or authority, and is not augmented by harmonizing with popular conviction, or by a reasoned process of thought, it is not, for practical purposes, a real opinion. It may be of temporary political importance, but it will lack the strength and permanence to make it a controlling factor in an efficient democracy. For democracy, to be efficient, must have a continuity of purpose and a stability of ideals. The popular belief in favor of the recall of judges and judicial decisions in the campaign of 1912 is an excellent example of a popular impression as distinct from public opinion. The belief was largely a result of authority. Such popular leaders as Colonel Roosevelt, Senator La-Follette and Mr. Bryan created almost a popular furore in its behalf. In less than two years it was politically dead. Surely such a fickle sentiment would not be a safe guide for a great democracy amidst the profoundly disturbing problems of to-day. It should be observed that the issue, while sponsored by good political authority, did not lie full square with popular conviction, and was not urged upon public attention for a sufficient length of time to enable the public to arrive at personal conclusions. It

is true that the advocates of the recall tried to create a close and necessary harmony between the proposed reform and the established convictions in favor of popular control. But this was unsuccessful, since, at the same time, it equally antagonized a popular conviction regarding the separation of the courts from politics. It was not, therefore, a real opinion.

It is evident, from the examination of the nature of public opinion, that there are certain factors and conditions necessary for its existence. We have already noted that in certain Central American democracies a public opinion is not possible, and that democracy is immediately supplanted by despots, dictators, or obligarchs. It was this fundamental ideal that Mill had in mind when he declared that nationality was an essential to representative government. It becomes important, therefore, to consider what are the conditions essential to public opinion. There are two conditions that seem to be absolutely indispensable.

/The first and the most obvious one is a homogeneous population, frequently identified with the idea of nationality./ According to Mill "this feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Community of language and community of religion greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past."[1] Unless this feeling exists, it is improbable that the minority will always be ready and willing to acquiesce in the opinion of the majority. The presence

[1] *Representative Government*, Chap. XVI.

of antagonistic races may thus prevent the existence of opinion that is really public. Illustrations are afforded by the negro population in the Southern states during the rule of the carpetbaggers, the French population of Alsace-Lorraine under German dominion, or the struggling, contentious races represented in the population of Austria-Hungary. Deep lines of religious and economic cleavage may so divide the people as to prevent popular opinions from being truly public as in the case of the Nationalists and the Unionists of Ireland. The importance of these factors increases, rather than diminishes, as the suffrage is extended to those lower in the intellectual and cultural scale, for as President Lowell has observed, "religious intolerance and racial antipathy, the horror of the man with an unfamiliar form of worship, the instinctive dislike of the man who speaks a different tongue or pronounces his words in a strange way, usually increase as one descends in the social scale. The result is that deep-seated divergencies of this kind not only unfit a country for popular government, but an attempt to introduce it tends to magnify them. The strife of races has increased in the Austrian Empire with the growth of representative assemblies, and the Irish demand for Home Rule became louder with each extension of the suffrage."[1]

The second essential to the existence of public opinion is a community of basic political convictions, and a national unity of fundamental ideals, purposes, and objects. Groups may differ as to details, but if their fundamental purposes and convictions are in conflict, there is little opinion that is really public. For instance, in France the monarchists are in direct conflict with the rest of the public on the fundamental question of popular government.

[1] *Public Opinion and Popular Government*, p. 36.

and while the monarchists may not rise in revolt, they do not accept the popular verdict in favor of democracy as final or binding. This prevents the adequate development of a true public opinion and weakens proportionately the democracy of France. If a democracy is to succeed, it would seem essential that the people should hold certain fundamental convictions in common, such as a profound belief in and devotion to the principle of liberty through law, and its coördinate concepts of toleration and self-restraint. They should have a common and firm belief in lawful evolution and against revolution as an efficient means of progress. They should share a common conviction as to what constitutes due process of law or the proper methods and occasions for governmental interference with individual rights. Since most of our public opinion is created by authority, conforming to the basic philosophy or convictions of the people, the importance of a community of fundamental conviction seems obvious.

It is generally assumed that in America these convictions are commonly and uniformly held. While there is every evidence to believe that our people cling tenaciously to these concepts, when threatened by alien foes, they are not such an inherent part of our beliefs as always to prevail in domestic life. A people that will tolerate mob violence, accompanied by incredible barbarity, particularly when directed against the negro race, with apparent calm and indifference, cannot be said to be vitally devoted to the idea of individual right and liberty. The invidious discrimination against this race, both in legislation and administration, shows a popular disregard of the liberty and rights of others. It increases rather than diminishes racial antipathy. The public opinion that approves and secures these measures is not truly public, for the negro accepts them only under compulsion of force. In

the meantime it is creating a group of irreconcilables and to that extent prevents our government from being really democratic. The recent race riots demonstrate the domestic dangers that inhere in the existence of such groups. When Mr. Victor Berger conducted his canvass for reelection to Congress, after having been refused his seat because he stood convicted of illegal conduct, pending an appeal, it is significant that his campaign, which was permeated with a spirit of hatred and resistance to our institutions, aroused the enthusiastic response of the colored race.

America is divided into many religious groups and faiths, and yet such lines of cleavage have rarely interfered with the forces of public opinion, for the sole reason that as a people we are more firmly grounded in religious liberty and toleration than we are in narrow sectarianism and religious bigotry. But who would doubt that, should we lose sight of that fundamental conviction as a people, and a majority interfere with the religious liberty of the minority, we would at once have a group of irreconcilables that would refuse to acquiesce or who might resist with force. Innumerable illustrations might be cited to show that the success of American democracy, operating over so large a territory, with so many differences in temperaments and beliefs, is only possible so long as underneath these differences there is a basic unity as to fundamentals.

The value of such unity Professor Cooley finds illustrated in our urban centers. "It is a chief factor in the misgovernment of our cities that they are mostly too new and heterogeneous to have an established consciousness. As soon as the people feel their unity, we may hopefully look for civic virtue and devotion, because these things require a social medium in which to work. A man

will not devote himself, ordinarily, where there is no distinct and human whole to devote himself to, no mind in which his devotion will be recognized and valued. But to a vital and enduring group devotion is natural, and we may expect that a self-conscious city, state, university, or profession will prove to be a theatre of the magnanimous virtues."[1]

Closely related to this subject, because adopted to preserve the fundamental concepts which represent the mature deliberation of the people against hasty and ill-considered action, is the doctrine of constitutional restraints. This subject will receive fuller discussion later, but its relation to public opinion is so important that it should be noted here. While the American people agree in their general political convictions, yet under the pressure of racial prejudice, or inflamed passion, they frequently are tempted to disregard these principles in specific instances. Since such disregard, though limited to specific cases, tends to develop irreconcilables and undermine public opinion, it is of the utmost importance that such lapses should not occur. Consequently we have placed these fundamental concepts into our constitutions, provided that any legislative or administrative action that violates them shall be void, and have confided the enforcement of such provisions to an independent judiciary, which is reasonably free from immediate popular control.

Among the ideas thus embodied in our fundamental law are the guarantees against taking life, liberty, or property without due process of law, and the guarantees of religious freedom, and of the liberty of speech, press, and assembly. These latter guarantees are of particular importance to public opinion. In times of stress and strain, when majorities are tempted to impose upon the

[1] *Social Organization*, p. 134.

rights of the minority, there is always the temptation to cut off the freedom of expressing dissent. This right of the minority to express dissent and to enjoy the freedom of discussion has been called the safety valve of democracy. It gives to the minority the feeling that its point of view has had its day in court, it gives to the mandate of the majority the appearance of justice rather than of arbitrary power, and tempers the discussion of the majority with the criticism and viewpoint of the minority. Opinions formed by the people under such conditions are infinitely more acceptable to the members of the minority, and therefore more readily secure voluntary acquiescence, than if arbitrarily formed without the freedom of dissent. Nothing would create groups of irreconcilables among a spirited people more quickly than a denial of this fundamental right. The doctrine of constitutional restraint, implies, therefore, that the minority consider themselves bound by the majority only so far as they act within the limits of their constitutional power. Our people, for instance, in normal matters of national policy, consider themselves bound by the acts of the constitutional majority, when they would not consider themselves so bound if the majority invaded their constitutional rights of religious liberty. It is thus that the fundamental concepts of the people are protected against hasty or ill-considered abuse by a temporary majority. In a country representing as many races, interests, and creeds as America, such restraints would seem essential to the success of democratic government.

We come now to the reliability or trustworthiness of public opinion as a means of controlling political affairs. As already noticed, popular belief need not be accurate in order to be real opinion, and control by public opinion does not, therefore, guarantee either the justice or

accuracy of the control. In some of the Southern states before the middle of the last century, there can be no doubt that there was a very real public opinion in favor of slavery, and yet no one would argue that such an opinion, determined the question of the wisdom or justice of that institution. The most that any careful student of politics would contend for in behalf of democracy would be that in a country where the conditions essential to public opinion obtained, a popular government would have certain elements of strength and stability, and a definite tendency to realize the aspirations and convictions of the people, that would be lacking under other forms of government. And this is doubtless ample justification for a democracy in a country such as ours.

However, we are not primarily concerned here with the justification of democracy. Our present discussion is based upon the assumption that in America the question of democracy is no longer open to serious debate. "Shall the people rule" is never a real issue in American politics, despite the fervid utterances of demagogues and politicians. "How should the people rule, in order to rule the most effectively?" is, however, a very vital question. It is this fundamental problem that we shall discuss primarily in the chapters that are to follow.

We have found that popular government is one in which public opinion has control. There can be no popular government, therefore, unless there be a public opinion that has sufficient permanence and vitality to rule. Public opinion, to be effective in political control, must be really public; that is, one in which the minority, though they disagree, nevertheless feel they ought freely to acquiesce. It must also be real opinion, one that has a firm grip upon the lives and thoughts of the people. If accepted merely upon authority or by suggestion, it should

harmonize with their established creeds. Otherwise it should be a partial product of their own reason and experience, in order that it may have both permanence and force. Such opinion cannot exist except among a homogeneous people, united by a harmony of basic convictions as to the rights, methods, and purposes of democracy. In such a government, two fundamental questions present themselves. The first is how may the accuracy and reliability of public opinion be improved? This question will receive brief consideration in the next chapter. The second is the one above suggested, of how must public opinion rule in order to rule the best? This is a question with which this volume is primarily concerned. It deals with the methods and ways in which public opinion may be the most wisely and faithfully translated into the accomplished facts of legislation and administration. It is through the study of these two processes particularly that popular government may hope to achieve, in a reasonable degree, both efficiency and democracy.

SUGGESTIVE QUESTIONS FOR

CHAPTER I

I. In discussing political abuses in American politics, some one has suggested that the remedy for the evils of democracy is more democracy. Discuss and criticize this proposition.

II. Would a referendum vote on the question of the abolition of religious liberty register a true public opinion?

III. Would a plebiscite on the question of Irish independence be a solution in accordance with the conception of popular government.

IV. A proposed initiative and referendum amendment in Ohio provided that the initiative and referendum should never be used as a means of adopting the single tax. Was this exception consistent with the principles of popular government?

V. When the Southern states desires to secede from the Union and the United States prevented them by force of arms, was that a violation of the modern doctrine of self-determination?

VI. Would home rule for Ireland violate the principles of self-determination or the theory of popular government so far as Ulster is concerned?

VII. In determining whether the Russian people should be organized into a national empire, or divided into a number of independent states, would a plebiscite, taken over the entire empire, afford a rational solution?

VIII. Suppose in the preceding case that the majority of the people of the entire empire had voted against

division but the people of one province had voted in favor of division. What would be the proper solution?

IX. Some one has declared that there never would be popular government in America until woman's suffrage is adopted. Give a critical discussion of this statement.

X. Discuss critically the following statement: "We shall never enjoy true popular government in America until we free the people and their legislatures from the tyranny of constitutional restraints."

CHAPTER II

THE IMPROVEMENT OF PUBLIC OPINION

"SANGUINE enthusiasts for democracy are inclined not only to regard it as a panacea for all ills, but also to believe that it possesses an infallible power to create the conditions needed for its own successful operation. They are apt to urge, as the first step in a country hitherto despotically ruled, the creation of a popular representative assembly, assuming that practice in the art of self-government will rapidly develop the qualities essential for a genuine public opinion. But to throw a child suddenly into deep water and expect him to teach himself to keep afloat is as irrational as to forbid him to enter the water until he has learned to swim. Preparation and practice must go on together gradually; and the preparation consists largely in the growth of political homogeneity and of the interchange of ideas. England was prepared for self-government by the Norman and Angevin kings who forced upon the people a common nationality and a common law, while the habit of discussing public affairs was well established long before Parliament acquired supremacy. Even in a highly advanced state of civilization a representative assembly, set up before the community is capable of a real public opinion, is liable, if not a mere sham, to result for a time in the oppressive rule of a class—as happened in Prussia for the dozen years after the convulsions of 1848—or to develop corruption, such as was used to work the parliamentary form of government in France under Louis Philippe."[1]

[1]Lowell, *Public Opinion and Popular Government*, p. 38.

This sound observation of President Lowell has been too frequently ignored by the politicians, reformers, and citizens of America. "The remedy for the evils of democracy is more democracy" has too frequently been accepted as a self-evident proposition. Yet the very people whose slavish credulity is imposed upon by the unscrupulous demagogue, know full well, if they would only think, that the remedy for the evils of democracy during "carpet-bag" days in the South, in Mexico, and in certain of the Central American countries for a century, and in some of the large cities of our land to-day, was not to be found in the instrumentalities of popular control, nor in the devious devices of democracy—for these they had—but only in the development of a public opinion that is competent to rule. The New South could be erected upon the ruins of the Old only when the negro was deprived of his right of franchise and democracy was decreased rather than increased. No one would seriously contend that real popular government would supplant the rule of dictators and despots in Haiti or San Domingo through the establishment of the referendum, the recall, or the direct primary. No one would argue that the notorious first ward of Chicago would be cleansed of its political corruption by all the electoral machinery that political reformers could devise.

And yet when we have felt the pressure of political problems and the need of effective action, we have too frequently inclined to the leadership of the demagogue, with his rhythmic sophistries that appealed to our national sense of self-complacency and lulled us to a false sense of security, and rejected the sterner challenge of the statesman to grapple with the fundamental problems of civic efficiency. We have had a mythical confidence in the automatic efficiency of democracy. With the succes-

sive adoption of each political panacea, the public has sighed with relief and settled back to await the early coming of the millennium.

There are three fundamental considerations that make it imperative to abandon this complacent attitude, and to undertake a constructive program for the improvement of public opinion. The first consideration is the rapidly growing complexity of modern problems. It may have been that the American people were competent to form a reliable opinion upon most of the public questions that confronted them a century ago, but that is no evidence that the same is true to-day. Life then was relatively simple. There were few professions and they were not very far advanced. The specialization of knowledge was in its infancy. There were few problems that confronted the public that required expert opinion then, whereas to-day there are very few that do not. Then almost any intelligent voter on a school board could pass with reasonable intelligence upon the problems that confronted them, of whether the teacher was competent to teach the elementary branches, and whether the little red school building was adequate and satisfactory. But to-day, the most intelligent member of the city school board would scarcely dare to pass upon the architectural features, the most suitable equipment, the qualification of the various teachers for the various lines of instruction, the best organization of the curriculum, etc., without the aid and counsel of many different experts. The question of public health, the regulation of public utilities, the establishment of efficient sewers, the best methods of fighting epidemics of various diseases, and similar problems require a public opinion competent to function, either directly or indirectly, upon questions of the most complicated and technical character. The question of pre-

paring the electorate to deal effectively with these problems becomes a matter of prime importance to the democracy that would perpetuate itself.

The second reason for a more aggressive attitude toward the problem of perfecting public opinion is the growth of class problems, which tends to produce a class consciousness with its inevitable tendency toward the development of irreconcilable groups. Moreover, with this development there has come a professional group of advertising experts and campaign managers, who have mastered the art of suggestion, and of mobilizing the passions and prejudices of the populace to their own desires. The development of public opinion or impressions through other than rational methods has become a science. Where great or vital interests are at stake, these forces for the irrational control of public opinion will be inevitably employed. Through the vicious methods of capitalizing group, class, or racial prejudices and hostilities, existing antagonisms are increased and irreconcilables developed. In describing these forces, Graham Wallas observed that "if the rich people in any modern state thought it worth their while, in order to secure a tariff, or legalize a trust, or oppose a confiscatory tax, to subscribe a third of their income to a political fund, no Corrupt Practices Act yet invented would prevent them from spending it. If they did so, there is so much skill to be bought, and the art of using skill for the production of emotion and opinion has so advanced, that the whole condition of political contests would be changed for the future. No existing party, unless it enormously increased its own fund or discovered some other new source of political strength, would have any chance of permanent success."[1] The only limits to this dangerous power are

[1] *Human Nature in Politics*, p. 5.

those provided by the intelligence, convictions, and training of the citizens to whom it will be applied. For a democracy to ignore the training of its citizens under these conditions is to court disaster.

The third factor augmenting the importance of popular education for improving the efficiency of public opinion is the immigration problem in America. With the almost uninterrupted stream of immigration that has poured into our country, totaling over thirty-three millions in a hundred years, America is confronted with a constant menace to the homogeneity of her population and to the vitality and integrity of her ideals. Unless the process of education and Americanization can be carried on with great energy and effectiveness, the efficiency of public opinion in controlling the national destinies, according to American ideals, will be materially impaired.

There are two ways in which the improvement of public opinion must take place. In the first place it must be enlarged in its scope. The expanding functions of the modern state require the formulation of public opinion with regard to many things, heretofore considered outside the realm of political control. Unless the popular point of view and thought can be expanded, by educational and other methods, to include these things, democracy will suffer. Unless the people can be educated to the idea of compulsory education, prohibition, new forms of public control, and other innovations in our political development, not only will democracy fail to be efficient, but irreconcilables will develop. In the second place, public opinion should be improved by making it a more accurate and reliable guide for political achievement. Unless the improvement of public opinion along the lines here suggested can keep pace with the increasing stress and strain to which modern governments are subjected, and with the

technical nature of the problems which they present, the hope of an effective democracy is gone.

An analysis of public opinion seems to indicate that most public opinion is the result of suggestion or authority, harmonizing with the established philosophy or convictions of the people, or that it is a result of a more or less rational process of acquiring facts and making the proper comparison, analysis, or generalization, in the light of the established opinions of the thinker. In view of these facts there seems to be three main forces in the creation of public opinion upon political affairs—the press, party leadership, and the intellectual and philosophical equipment of the people. The problem of improving public opinion is, therefore, primarily concerned with these three forces.

The influence of the press upon both popular impressions and public opinion is tremendous. The modern newspaper with its artful headlines, its clever cartoons, its sometimes misleading "leads," and its selected news, wields an almost resistless power. The most dangerous aspects of this problem are found in the fact that it is through suggestion rather than through news, argument, and persuasion that popular thinking is controlled.[1] Mr. H. E. Gardiner found that a very important factor in

[1]Just what are the controlling factors in suggestion and the relative value of the various means of controlling and guiding public opinion is a matter for the student of social psychology. In the author's opinion there can be no truly scientific account of politics and no accurate formulation of political theory until we have the groundwork supplied by psychological research in the field of politics. Much scholarly and scientific work has been done on the descriptive and legal aspects of the subject, but no adequate theory of politics is possible which does not include the dynamic elements of human nature. Happily there is a recent tendency on the part of students of social psychology to push their inquiries into the field of political phenomena. McDougall's *Social Psychology,* Graham Wallas' *Human Nature in Politics,* Cooley's *Social Organization,* Ross' *Social Control* and similar volumes have an important bearing upon political science that cannot be ignored.

the fall of the Asquith Ministry was the action of the Northcliff press in the continual featuring of the two words "wobbling" and "muddling" in connection with the ministry. This was done in the headlines and leads, and was repeated and reiterated until the public unconsciously accepted it as the truth, not as a result of evidence or reason, but of suggestion. The author recently had charge of a discussion, on the general subject of the ratification of the covenant for the League of Nations, among a group of fifty picked business men. They were all accustomed to reading the same newspaper, which was very ably managed and which had taken a very definite stand in favor of the Lodge reservations, and which was violently opposed to ratification in any other form. The great majority of those present took the same position as the paper. The significant thing was that only one present had read the covenant, and not one of them had read the Lodge reservations which they favored so strongly, and only five or six even had any definite idea as to any of the matters included in the reservations, further than that they involved the Monroe Doctrine and that they were intended to protect the vital interests of America. This experience seems to demonstrate that the newspaper in question had moulded the opinion of the great majority of the men present, and that it had done so through suggestion rather than through argument or evidence. They had evidently gone no farther than to glance at the cartoons, the headlines, and the leads, for if they had read the news, the evidence, the arguments, and the editorials, they would have read at least some of the reservations and would have had some definite impressions as to their content. A newspaper can, therefore, create public opinion or impression regardless of the evidence, facts, and arguments.

President Garfield, in addressing the Republican Convention of 1880, declared that the verdict upon the work of the convention would be determined "by four millions of Republican firesides, where the thoughtful voters, with wives and children about them, with the calm thoughts inspired by love of home and country, with the history of the past, the hopes of the future, and the knowledge of the great men who have adorned and blessed our nation in days gone by." To this eloquent assertion Graham Wallas has retorted that "the divine oracle whether in America or in England, turns out, too often, only to be a tired householder, reading the headlines and personal paragraphs of his party newspaper, and half-consciously forming mental habits of mean suspicion or national arrogance. Sometimes, indeed, during an election, one feels that it is, after all, in big meetings, where big thoughts can be given with all their emotional force, that the deeper things of politics have the best chance of recognition."[1]

It thus becomes evident that the power that controls the press can exercise a tremendous amount of arbitrary control over the destinies of a democracy. If its influences were limited to the news and arguments that it published, its power would be educational rather than arbitrary, but when the larger part of its influence is exerted through suggestion and similar non-rational methods, it may represent irresponsible power. A man with the financial and editorial genius, by building up a metropolitan paper, can frequently dominate the politics of a state. Any adequate program, therefore, for the improvement of public opinion must include the influence of the press.

The public control of the press in the interests of veracity and good faith has frequently been urged in many

[1] *Human Nature in Politics*, p. 112.

forms. The laws of libel operate as some restraint upon dishonest statements that do injury to individuals. But a newspaper may conduct a very effective campaign against an important public issue, in defiance of evidence and the public weal, and yet easily avoid the offense of libel. Another measure has been to compel the newspapers to give publicity regarding the identity of the editors, managers, publishers, owners, bondholders, mortgagees, and stockholders, in order that the reading public might know what interests backed the paper, and what bias to expect. This was enacted in a federal statute in 1912,[1] but its beneficial results have not been obvious.

Another proposal for safeguarding the public interest against the possible abuse of power by the press is the state license plan. Several years ago Mr. Barrett O'Hara prepared a bill providing such a system for the state legislature of Illinois. In the following striking statement of his own experience, as a reporter of a newspaper in a city of six thousand, he gives his reasons for the license plan. "Here was a city of six thousand persons, a reading community of fifty thousand men and women, whose happiness and peace of mind, whose reputation and honor literally rested in the palm of my hand. Under age and unlicensed, I could not have practiced law, I could not have served as doctor, surgeon, or dentist, I could not even have been a nurse or a barber; but I could serve the community as reporter and editor. In my hands, boyish and inexperienced, without a single legal safeguard, was placed the dynamite of publicity, a weapon powerful enough, if improperly and unwisely used, to destroy the happiness of hundreds of people."[2] The bill provided for a State Board of Journalism which was given power to license newspaper men as members of the profession of

[1] *U. S. Compiled Statutes, 1918*, sec. 7313.
[2] Merle Thorpe, *The Coming Newspaper*, pp. 149, 150.

journalism. Persons should be licensed only upon proof of legal age, the equivalent of a high school education, two years' collegiate training or an equal period of newspaper experience, positive proof of good moral character, and the successful passing of a written examination given by the state board. Provision was made for revocation of licenses.[1] The bill was defeated, but the question of protecting the public against error and inexperience in the publication of information remains an unsolved problem of profound importance to popular government.

Another suggestion worthy of consideration is to create a criminal liability for the deliberate suppression, falsification, or unjustifiable coloring of news items. The administration and enforcement of such a law would present peculiar difficulties, but if efficiently done, should prevent some of the grosser abuses in the creation of inaccurate public opinion. Any such law should provide that good faith and probable cause be accepted as a valid defense. In this manner the honest editor would receive ample protection. Surely in a democratic government, the public interest in the good faith and accuracy of the news is of sufficient moment to justify criminal measures in its behalf, if they can be made effective.

In addition to these means of public control, several other suggestions have received consideration from time to time. There has been considerable agitation for an endowed press, controlled by public-spirited men, freed from the stress and strain of financial need, and from the fears and thoughts of the advertiser's ire. The suspicion that has rightly or wrongly been directed against privately endowed educational institutions might raise some question as to the results that would follow. Moreover, the practical difficulties in the way will probably prevent

[1] *Ibid.*, pp. 155-6.

it from playing a large part in the solution of the problem. The coöperative press in which the ownership and management is vested in a large number of small, local stockholders has been urged by others as a splendid solution of the problem, especially among smaller, homogeneous communities. The possibilities here should be attractive, though the difficulties are great, and there is no actual experience upon which to build.

It will be readily seen from the foregoing that little has so far been accomplished in the way of protecting public opinion from the control of an ignorant, dishonest, or prejudiced press. The public do not seem to have grasped the vital importance of a fair and accurate press to an efficient democracy. It has therefore been left to the unregulated discretion of the proprietor. He may be a "king maker" who seeks to be the power behind the throne; he may be the agent of some special interest who desires to mislead the public to his own private gain; he may be merely a shrewd business man, who controls the policy of the paper to suit the purposes of the advertiser; he may be a public-spirited citizen who desires only the highest service to his community; whatever be his motives, all he needs to do is to buy the paper and the brains to run it and the power is his. In the last analysis, under our present régime, the only limits to that power are to be found in the intellectual and philosophical equipment of the public. If they are grounded in sound, fundamental convictions, and are alert and critical in their point of view, the power of the press for evil is definitely reduced. The financial strength of the paper is conditioned upon the quantity and quality of circulation, which determines, with an almost mathematical certainty, its advertising rates. Until something constructive is done,

therefore, we must rely upon the education of the people to restrain the abuses of the press.

The second factor in the creation of public opinion is party leadership. Its importance scarcely will be questioned. Especially is this true with regard to matters outside the domain of popular knowledge. Regarding foreign affairs, about which most of our citizens are profoundly ignorant, there is almost a fatalistic tendency to follow the dictates of party leadership. An elaborate organization was created in Wisconsin to mould public sentiment in favor of a league of nations, just after the signing of the armistice. The idea received almost unanimous approval. But when the proposed covenant was given to the public, and the Republican leaders at Washington announced their opposition to it in the form presented, immediately there followed a division along party lines. And this is neither strange nor irrational. Very few had the historic background or the knowledge of world affairs to come independently to a rational conclusion. On such occasions, party leadership becomes of paramount importance.

This has been generally recognized, and in the last generation the state and federal governments have undertaken so to regulate political parties that party membership should have full and adequate control in the selection of party candidates, party officers, and party platforms. It was one of the theories of this mass of legislation that, by giving the party membership actual power to choose and dismiss its leaders, the qualities of leadership would be improved. This legislation may be divided into five general types. The first type of legislation sought to establish reasonable rules for the conduct of the party's business and to see that they were generally observed. These rules generally provided for such matters as the

time and place of political meetings and conventions and for adequate notice to the public, in order that the evils of the "snap primaries," "packed conventions," and similar abuses might be prevented.

A second type of legislation regulating political parties is found in the corrupt practices act governing both party and regular elections. These acts penalize bribery, fraud, intimidation, violation of party rules, and similar abuses. The third class of legislation is that dealing with party finance and the collection and expenditure of campaign funds. The most ordinary provision is to provide for complete publicity regarding all contributions and expenditures. Federal laws and many state laws prohibit campaign contributions by corporations and limit the amount to be expended by certain candidates. For instance, federal legislation limits the campaign expenditures of a representative to $5,000 and of a senator to $10,000. The limitations upon amount, though extremely difficult to enforce, are of increasing importance, particularly in the states where nominations are by direct primary. For, as heretofore observed, the business of advertising and of creating popular impressions, through the non-rational means of suggestion, has been reduced to such a science that the man who has ample funds to purchase such professional skill may become the creator rather than the creature of public opinion, regardless of the merits and principles involved.

A fourth class of regulations has to do with the election of delegates to party conventions, generally known as the indirect primary. Here the laws frequently provide that delegates to conventions shall be elected by the members of the party under all the safeguards that the law extends to regular elections. In this manner the right of the party membership to be represented in the party convention

by men of their own choosing is assured. The fifth group of regulations is concerned with the direct nomination of candidates by the members of the party, known as the direct primary, which are frequently conducted under the regular election laws of the state. Closely related to this is the preferential primary, where the party members elect delegates to a nominating convention and at the same time vote their preference in regard to candidates, thus instructing or binding their delegates as to the candidates desired.[1]

In these regulations the importance of party leadership is recognized and much has been accomplished in the way of making the party leadership responsible to the voters of the party, in nullifying dishonest and corrupt methods of control, and in bringing a large measure of publicity upon party affairs. Despite these regulations, however, party leadership frequently depends upon the spirit of blind partisanship among its followers in the creation of popular impressions or opinions. The formulas and political catechisms of party managers are too frequently accepted at their face value, with no rational process of thought involved. And the opinion that prevails in the average election is too frequently the product of authority or suggestion, rather than of critical thought. With the party managers so directly responsible to the people as they are to-day, it may safely be presumed, perhaps, that they will exercise greater care and diligence in the selection of candidates and issues, but this is merely another way of saying that in the last analysis, the quality of opinion that prevails will be conditioned directly upon the intelligence and convictions of the people. For political managers must look to the public for their power and

[1]For a fuller discussion of the legal regulations of political parties see P. O. Ray, *An Introduction to Political Parties and Practical Politics* (revised ed.).

strength, and the character of leadership and political opinion that is produced by these managers will depend upon what the public exact of them as the price of popular support. If the public is satisfied with specious pleas of the demagogue and the partisan, it is expecting too much of human nature to suppose that the party leader will pay a higher price for his popular support than the public requires. For no political manager or boss has any power save that which the people give, and the people can exact what price they will.

This brings us to the third and final factor in the creation of public opinion, the intellectual and philosophical equipment of the people. In the last analysis it is that factor that finally controls. No newspaper can have strength without popular support and no party leadership can enjoy power, save for a fleeting instant, without popular confidence and approval. The improvement of public opinion must very largely depend, therefore, upon the intelligence and convictions of the people. This immediately presents two questions, viz.: what are the popular qualifications that will enable the people to form opinions that are more rational and accurate, and how may those qualifications be developed?[1]

The author believes that there are three qualifications that would materially aid in improving the quality of public opinion, and that these qualifications may be developed to a very efficient degree in connection with the curriculum of the public school.

The first qualification which our schools might reasonably be expected to develop in all the pupils is the habit of critical observation. This is largely based upon the instinct of curiosity, and the delight of intellectual discov-

[1]The author's recent volume on *Dynamic Americanism* is devoted to these two questions.

ery. This can be developed in connection with all phases of school work, and is perhaps best done in the socialized recitation, where the instinct of competition is enlisted to detect error in fact or judgment. The best way to defeat the power of suggestion is to expose ruthlessly its devices. A conjurer is able to arouse a certain awe and even worship in some quarters until his tricks are explained, when he becomes very commonplace. Let children once learn the popular methods of suggestion and they become the objects of amusement rather than of veneration or belief. In the study of current events the child may soon be taught the editorial devices of the press, by being required to compare the news, headlines, leads, and editorials of opposing papers. The comparison of the campaign literature of opposing parties, the checking up of platform utterances with actual achievement, and similar methods may be employed to develop the habit of critical analysis and to stimulate the curiosity. What better and more stimulating subjects for theme writing could be employed? Graham Wallas has suggested that a young child could be very easily taught why it is, when he is sent to buy a bar of soap, he feels inclined to purchase that which is most widely advertised, and why there is no rational relation between that feeling and the processes that would result in the wisest selection of the soap.[1]

The second method for increasing the efficiency of the citizen is the establishment, in the life and consciousness of the child, of a definite connection between his social instincts and the facts of practical politics. This is essential to create the dynamics of citizenship. If a Mexican mob kills American citizens, public opinion is aroused to a state of violent protest or of war. But American mobs have lynched on the average over 100 persons annually

[1] *Human Nature in Politics*, p. 189.

for thirty years and it causes scarcely a ripple upon the surface of our complacency. And yet no one would argue that the permission of such crimes by the misgoverned people of Mexico was a worse offense than its toleration by our enlightened government. The failure of our democracy to provide adequate protection against proverbial industrial accidents and disease results annually in an appalling loss of life and limb, and yet the public seems unconcerned. The difficulty is that the relation between war, with its heroism, tragedy, and sacrifice, and the normal instincts of youth is obvious, direct, and vital. Their instinctive life is unconsciously organized around the concepts of martial glory and the only dynamic patriotism that they feel is expressed in terms of military exploits and national honor. And yet the hope of the situation lies in the fact that it is not necessarily so. If the child is taught to see in his government not the mere legal skeleton of its framework, but a vital, organic instrument, clothed with the flesh and blood of human interest, entrusted with the sacred task of saving life and limb from needless accident, and of protecting the helpless and the weak from the tyranny of the strong, the generous emotional life of youth will respond with a patriotism of peace as virile and effective as the patriotism of war. When the deeply human significance of government is brought home with dramatic vividness, a new interest in politics will be aroused, thoughtful inquiry and discussion will be stimulated, and there will result a public opinion of increasing accuracy and strength, where before ignorance and indifference held sway.

The third method, whereby the schools can prepare the way for a more accurate public opinion, is in impregnating in the consciousness of the child, as fundamental convictions of his life, several of the basic ideals that

experience has shown to be essential to the strength and life of our democracy. If all of our citizens were thoroughly grounded in these ideals, and the historic background that produced them, American public opinion would gain in unity, strength, and quality. In the preceding chapter we have seen the important part played by established convictions in the formulation of opinion, and we should build accordingly. This does not mean a mere reiteration of trite and traditional phrases, a mere lip service to the ideals of the nation, but a careful tracing out, from the evidence of history, of those fundamental concepts, with an adequate understanding of what they have cost humanity in terms of blood and treasure, resulting in a profound devotion, born of a realistic consciousness of their value and a gratitude to those whose suffering and sacrifice have brought them forth. The fundamental value of liberty should be one of the connections thus developed. It should be shown that liberty means more than freedom from physical restraint or an absence of political tyranny. It should be translated into terms of modern problems, and comprehended as the energizing force from which springs the imagination, the genius, and the spontaneity of our national life. Its enemies of to-day are economic rather than political, and its correlatives of toleration and self-restraint need an equal emphasis.

To this ideal of liberty should be added the ideal of national unity, the conviction that progress in democracy must come by evolution and not revolt, and that for every ideal and right in a democracy there is a corresponding duty on every citizen to see that the right is respected and the duty is fulfilled. A new sense of individual responsibility for democratic ideals is indispensable to a sustained and intelligent interest in public problems. Without such

a sustained interest public opinion can be neither accurate nor virile.

We have found that democracy is not automatic. It does not necessarily guarantee the conditions of its own success. With the rapid development of technical problems, the tendency toward class consciousness, and the grave menace of immigration, an increasingly heavy strain is cast upon the fabric of our institutions. If popular government is to perpetuate itself under these conditions, public opinion must be extended in its scope and made more accurate in its judgments. To accomplish this we must attack the problem of securing a more accurate, honest, and impartial press, a difficult but a profoundly important task. Party leadership must be safeguarded against vicious influence and restrained from the abuse of power. But the only final check, either upon the conduct of the press or the character of party leadership, is to be found in the intelligence and convictions of the people. It is in the development of the latter, through our public schools, that we find the surest method of improving the scope and quality of public opinion. And this is the only enduring foundation upon which the structure of democracy can rest secure.

SUGGESTIVE QUESTIONS FOR

CHAPTER II

I. Has the increasing intelligence of the average citizen kept pace with the tremendous increase in the number and technical nature of public problems?

II. If it has not, then how can the public proceed to the intelligent solution of such problems?

III. Explain in detail the relation of Americanization work to the cause of popular government in America.

IV. What concrete examples can you cite of where great advertising schemes have developed a form of public opinion or popular impression by suggestion or other non-rational methods?

V. Is the so-called independent press free from responsibility to any one save its owner an improvement upon the party press, where the political party could be held to accountability for its conduct? Discuss.

VI. Do the legal reforms of political parties necessarily guarantee a higher type of political leader? Why?

VII. Why is the political manager or boss absolutely dependent upon the conditions of popular approval?

VIII. In what practical way would the habit of critical observation be useful in developing a public opinion that would be more reliable?

IX. In what practical way would the moral and emotional development of youth tend to improve the quality of public opinion?

X. Explain the relation of sound popular conviction to the reliability of public opinion.

CHAPTER III

REPRESENTATIVE GOVERNMENT AND DIRECT DEMOCRACY

IT was Aristotle who argued that in a true republic, while the laws must conform generally to the popular will, yet at the same time the people must be ready to elect, for the conduct of the state's affairs, men of superior training in the public business whose guidance they will accept. If one wants a pair of shoes, one does not try to make them for one's self, but employs a cobbler, because of the latter's superior skill and experience, and then reserves judgment for one's self as to whether the shoes fit or pinch. If the shoes fit one continues to employ the cobbler, otherwise another one is sought. So when people desire the efficient administration of public affairs, they should not try to do it all themselves, but they might well secure the services of statesmen and public men whose superior knowledge, skill, and experience has better equipped them for the task, while the people reserve judgment on the character of the services so performed.

This remarkably lucid discussion of the relation of public opinion to representative government has remained unrefuted, though not infrequently ignored. In the gust of histrionic statesmanship which swept America in the first years of the decade now drawing to a close, such words of wisdom were unfortunately ignored. In spite of the marvelous increase in the complexity and technical character of public administration, the reformers demanded less technical skill and larger direct control. If the technical development of the law followed too tardily behind the new problems and needs created by the increas-

ing speed and complexity of our social and economic life, the reformer ignored the idea of increasing the scientific and scholarly character of the bench, and demanded the adoption of the recall in order that the people might be supreme. If American workmen complained justly against the ravages of industrial disease, and the ablest students of the problem advocated the legislative adoption of scientifically drafted laws, it frequently was forgotten in the earnest efforts to secure the initiative and referendum as the panacea for economic ills.

The people, suddenly aroused from a long period of indifference, seeing glaring and tragic instances of governmental inefficiency, and finding that those into whose hands they had confidingly entrusted their political destiny had ignored the sacred character of the trust, sought to wreak their vengeance against the system which they had abused. The politicians, eager to win their favor, dared not denounce the people for their neglect. Instead they sought the public gratitude by providing spiritual alibis for those whose indifference had permitted the prostitution of political power. Impliedly admitting the failure of the public to select representatives worthy of public trust, they advanced the argument that this same public could themselves perform the technical duties of government better than they could select public servants, competent for the task. They could doctor their own ills with better results than could be obtained by selecting competent practitioners. They ascribed the evils that all forward-looking citizens had deplored to the representative character of our government, rather than to popular indifference and the absence of real opinion. Their proposals were to supplement the machinery of representative government with the various devices of direct democracy. The real desire of the multitude was for the larger

life and opportunities that could be secured only by the highest technical skill in solving the problems of modern life, backed by the sustained interest of an intelligent and awakened public. When the people demanded substance, the politicians gave them the form; when the public wanted bread, they received a stone.

Since this period, much improvement has been made, but there is little evidence that it has been due to the change in governmental forms. There is ample evidence to the effect, however, that it has resulted from an awkened public interest, which, though badly misdirected, has borne splendid fruit.

This misdirection of the public interest and desire was due largely to the failure to comprehend the organic relation between public opinion and popular government. The demagogues persuaded the people that the vital issue was "shall the people rule," and that they could only rule effectively when they ruled directly. The real problems were as previously indicated, "how can the people rule in order to rule the most effectively," and how can the improvement of public opinion be best achieved? This last question we have hastily sketched in the preceding chapter, and the various aspects of the first problem will receive attention throughout the remainder of the volume.

Since popular government is that in which public opinion prevails, it follows that the limitations of the former are to be found in the inherent nature of the latter. An inquiry into the most efficient way for a people to rule themselves involves, therefore, a careful analysis and classification of the different functions that the people must perform, and an accurate estimate of the possibilities of public opinion as applied to the performance of such functions.

These functions may, for practical convenience, be divided into three groups: the formulation or choice of a public policy when it involves highly technical and scientific knowledge or skill; the accurate determination of the many questions of fact upon which the successful administration of public affairs must necessarily depend; and finally the choice or formulation of a public policy which involves only simple questions of fact, the exercise of ordinary judgment, or the expression of a popular desire. Most of the important functions of government may be brought within these three categories.

In the formulation or choice of technical policies which constitutes one of the most important groups of public problems that we have today, we find that public opinion has very distinct and obvious limitations. Consider, for example, the formulation of a policy regarding industrial disease. The drafting of a statute to meet this very vital problem involves a technical knowledge of the various occupational diseases, the conditions that produce them, the practical manufacturing and mechanical processes that are involved, and the striking of that happy balance of convenience where the maximum of prevention consistent with the practical manufacturing problems is secured. Since this involves many and not merely one industry and one kind of disease, the bewildering complexities that must confront those who seek a solution of the problem become apparent. And this is saying nothing of the technical legal and administrative problems that are involved. For it is a well-known problem that many laws, finely conceived as to their purpose and content, have failed because of their failure to observe sound administrative principles, or to be translated faithfully into the technicalities of legal language. It becomes obvious that such problems require for their solution a careful

process of the division of labor between several classes of experts, each one of which makes his contribution toward the realization of the common end. The medical scholar who has specialized in industrial diseases, the practical manufacturing expert, the mechanical engineer, the legislative draughtsman, and the expert in the science of administration, must all cöoperate in the choice of a sound policy and its translation into an effective statute.

How can public opinion function the most effectively in the choice and formulation of such a policy? Is a real opinion possible in the premises? Could such a problem be effectively solved in a New England town meeting or by the modern initiative and referendum? The answer to these questions depends upon the nature of public opinion. To be real opinion, we have seen that the belief must originate with accepted authority and harmonize with the established convictions of the public, or it must be a result of some rational process of investigation and thought. We have few authorities who would be generally accepted as competent to endorse intelligently such a policy, and even if we had, there is an utter want of convictions among the people in regard to the fundamental problems involved. There are no popular convictions regarding the nature and conditions of lead poisoning, the mechanical and manufacturing problems involved in those industries where lead poisoning is found, sound principles of public administration, or the technical details of legislative draughtsmanship. In the absence of competent and accepted authority on the one hand, and of popular convictions regarding the matters involved upon the other, it seems more than obvious that there can be no real opinion upon the question, save it be as a result of a rational process of thought and investigation.

A moment's contemplation of the many technical as-

pects of the problem, involving several distinctly different branches of specialized knowledge, and the further fact of the popular incapacity to comprehend intelligently the technical legal language in which such a policy must be expressed if it is to be effective, can leave one in little doubt that upon such a question a real opinion as to the formulation of the policy, or the choice of a wise one from several different competing policies that might be submitted, is wholly impossible. It is inconceivable that the great majority of the public could obtain the command of enough of the technical facts, or access to enough competent authorities, or sufficiently comprehend the legal and administrative difficulties involved, to formulate a real opinion of their own.

To leave such a matter to a direct popular choice, or to entrust the selection of one from several policies to a mere "counting of hands" is not the enthronement of public opinion, but the abandonment of a vitally important problem to the fate of popular caprice or passing fancy. This is to place great power into the hands of the so-called "special interests" who might have a selfish desire for the defeat of an effective policy. They would have the means and the motive to employ the advertiser's art for the creation, by suggestion, of a popular impression against any step that might tend to be effective in the solution of the problem. For when the people are asked to pass judgment upon matters entirely outside of the range of their experience, knowledge, or convictions, they are at the mercy of the hired makers of publicity.

But this does not mean that public opinion cannot control in matters of technical policy. It merely means that in such cases public opinion cannot function directly and in advance of popular experience in regard to the proposed reform. It may nevertheless function effectively

in either of two ways, either by passing upon the desirability of the results achieved by the proposed policy after a period of actual operation, or by the choice of political leaders to whose wisdom, capacity, and fidelity the framing of such a policy can be safely entrusted. In the latter process the work of the leaders would, of course, be checked up in the light of the actual results achieved.

The first process necessarily involves the second, since if the people do not frame their own policies or choose them in advance, then in a popular government they must select those who will choose and administer their policies. We will, therefore, first consider the choice of leaders. While a public opinion is generally impossible on the question of technical public policies, yet it is equally clear that we generally have a real public opinion in regard to the great political leaders. The people soon learn to form an estimate of them through what they learn of their public record, their achievement, their public addresses, their sympathies, and their point of view. They will read and inform themselves to some extent regarding great personalities when they will decline to take any interest in technical issues. They find that this or that leader's tendencies, attitude, and point of view, on the whole, harmonize or violate their own convictions, sympathies, or philosophy, and a real opinion is created.

This does not mean that a real opinion exists in regard to every candidate submitted to popular approval at the polls. For under our unfortunate system, people are required to vote for insignificant public officers, many of whom are purely administrative or ministerial, who are not in any way leaders, and in regard to whom it is useless to suppose that a real opinion could exist. We are here considering only the dominant party leaders and the most powerful officers, whose position commands the in-

terest and challenges the attention of the average voter, and who, in the last analysis, exercise the controlling power in the choice and formulation of public policy.

"The sentiment of the people is most readily and successfully exercised in their judgment of persons. * * * The plainest men have an inbred shrewdness in judging human nature which makes them good critics of persons even when impenetrable to ideas. This shrewdness is fostered by a free society, in which every one has to make and hold his own place among his fellows; and it is used with much effect in politics and elsewhere as a guide to sound ideas.

"Some years ago, for instance, occurred a national election in which the main issue was whether silver should or should not be coined freely at a rate much above its bullion value. Two facts were impressed upon the observer of this campaign: first, the inability of most men, even of education, to reason clearly on a somewhat abstract question lying outside of their daily experience, and, second, the sound instinct which all sorts of people showed in choosing sides through leadership. The flow of nonsense on both parts was remarkable, but personality was the determining influence. It was common to hear men say that they should vote for or against the proposition because they did or did not trust its conspicuous advocates; and it was evident that many were controlled in this way who did not acknowledge it, even to themselves. The general result was that the more conservative men were united on one side, and the more radical and shifting elements on the other. * * *

"On this shrewd judgment of persons the advocate of democracy chiefly grounds his faith that the people will be right in the long run."[1]

[1] C. H. Cooley, *Social Organization*, pp. 142-3.

Not only is a public opinion possible in the choice of leaders, but it is also much more reliable than opinions that might possibly be formed regarding technical policies. If one becomes ill in a strange community, he does not care what the opinion of the community may be as to the diagnosis of his illness or the proper remedy, but the opinion of the community as to who is a competent physician upon whose professional services one may rely with confidence, he unhesitatingly accepts. Nor is that opinion based upon an intimate knowledge of the physician's technique, or of the different scientific theories which he accepts and about which the public is generally in ignorance, but is based upon the results that he has achieved in the community, and upon their estimate of his intellectual ability, his character, and his personality. While "quacks" may temporarily mislead, in the long run the judgment of the community is surprisingly just and accurate. Were it not so there would be little stimulus and incentive for the able, conscientious, and scientific practitioner. It does not seem an unfair analogy to suggest that just as intelligent people have found the best solution of their personal problems of health in the wise choice of those most competent to serve, testing the validity of their judgment by the results achieved, so the public may hope for the best accomplishments in the choice of technical policies by bringing their opinion to bear upon the choice of competent leaders, whose ultimate fate will be determined by the public according to the benefits achieved. Here we can establish a point of contact between the people and the government where a real opinion can obtain, and where it can function with maximum efficiency and beneficence.

What the undistinguished masses of the people may, in this way, contribute to the thought of the nation is

aptly summed up by Professor Cooley. "They contribute sentiment and common sense, which gives momentum and general direction to progress, and, as regards particulars, finds its way by a shrewd choice of leaders. It is into the obscure and inarticulate sense of the multitude that the man of genius looks in order to find those vital tendencies whose utterance is his originality. As men in business get rich by divining and supplying a potential want, so it is a great part of all leadership to perceive and express what the people have already felt."[1]

The function of public opinion in passing upon the results achieved is now too obvious to require extended comment. It may be argued that to delay public opinion until there has been opportunity for it to judge of results achieved involves dangerous and hazardous loss of time. To this three considerations should be urged. In the first place the public is given considerable protection when it is given the choice of leaders who are to formulate and determine the policy for them. This is the method universally employed by private individuals in attacking their individual problems and it is in this form that public opinion yields its most reliable and beneficent results. Secondly, no real opinion is possible on the question until it can be judged by results, and to attempt popular control without public opinion is to subject our national progress to the hazards of caprice and fancy. Thirdly, it is only when a technical policy has secured results and public opinion operates upon them that it has a basis of intelligent judgment. This last point is well illustrated by the case of the Wisconsin income tax. The tax when first enacted and enforced met with widespread and hostile opposition, and undoubtedly would have been repealed by popular vote had it been subject to the initiative and

[1] C. H. Cooley, *Social Organization*, p. 148.

referendum device. The great majority of the people had never kept books, and the making out of the returns seemed an unwarranted burden and an unjustifiable interference with private business. The press was quick to capitalize the temporary prejudice and opposition that was created. But after several years of operation, during which the public have had an opportunity to judge it according to its results achieved, it seems equally obvious that to-day public sentiment is strongly in its favor and it is now backed by a real opinion that is both effective and intelligent.

It thus seems that in the first class of public functions, the selection and formulation of technical policies, the devices of direct democracy must fail, in so far as they attempt to give expression to public opinion directly and in advance, for in such matters public opinion can only function in the choice of leaders or upon the results of the policy, and furthermore, it is only when thus functioning that public opinion becomes reliable, intelligent, and constructive.

We come now to the second class of functions, viz., the accurate determination of those questions of fact upon which the successful administration of public affairs must necessarily depend. The appointment of ordinary administrative and ministerial officers, as well as the appointment of experts for the public service, are essentially questions of fact, viz., who is competent for the duties involved? Important questions of both executive and legislative policy depend frequently upon questions of fact. Whether a board of health should order all persons vaccinated is dependent upon the facts involved. In the determination of public utility rates, in fixing tariff schedules, in selecting the best methods of public sanitation, in arranging the details of a public utility franchise, and in

innumerable like problems, intelligent action is only possible on the basis of the accurate determination of the material facts.

It requires no keen analysis of the situation to see very clearly that public opinion cannot function directly on this class of public questions, especially where the question lies entirely within the domain of specialized or technical knowledge, as is so frequently the case. Nowhere is the impotence of mere popular majorities, which do not represent real public opinion, better illustrated than right here. A popular vote of the state as to whether a certain person is an efficient state bacteriologist, or as to what is the most efficient system of accounting for a given department, or as to what is the best way to fight the epidemic of influenza, would be an obvious absurdity. Carlyle pointed out the futility of the ballot on such occasions where he declared that "Your ship cannot double Cape Horn by its excellent plans of voting. The ship may vote this and that, above decks and below, in the most harmonious exquisitely constitutional manner: the ship, to get around Cape Horn, will find a set of conditions already voted for, and fixed with adamantine rigor by the ancient Elemental Powers, who are entirely careless how you vote. If you can, by voting or without voting, ascertain those conditions, and valiantly conform to them, you will get round the Cape; if you cannot, the ruffian Winds will blow you ever back again."[1]

Then what becomes of popular government in such instances? Must we choose between the evils of bureaucratic tyranny and the absurdities of direct majorities? There are those who seem to have found no method of escape from this dilemma. A little reflection will, however, indicate that there are some very effective, though

[1] *Latter Day Pamphlets, No. 1. The Present Time,* pp. 12, 14.

indirect, methods in which public opinion may be employed. The first method in which public opinion may function in the solution of such problems is in choice of methods by which the question of fact should be determined. President Lowell has observed that "it does not follow that, because people have no true opinion on a question, they have no opinion on the method by which it ought to be decided. They may be incapable, and recognize that they are incapable, of forming an opinion about an intricate point of law, or about the guilt of a man accused of crime when the evidence is conflicting; and yet they may have a very definite opinion that the matter shall be decided by a court of law, and that its decision shall be enforced. The public may have no opinion about dealing with an epidemic, and yet it may have a very strong opinion that it ought to be combated by physicians who have proved their competence."[1]

Since the method employed in the settlement of technical questions of fact is of paramount importance, and since a real public opinion regarding method very commonly exists, it is evident that public opinion has an important rôle, where the political organization is such that its operation is restricted to the methods to be employed.

The second way in which public opinion may function in determining questions of fact is in the choice of public leaders who may be entrusted with the selection of the officers and experts, and the choice of methods. The superior facilities of public opinion for the choice of leaders as compared with the choice of issues and principles has been already sufficiently discussed. It merely needs to be noted that through the choice of efficient leaders the public may exercise a potent power in securing accurate, dependable judgments on questions of fact.

[1] *Public Opinion and Popular Government*, pp. 25-6.

The third group of public functions is the choice or formulation of public policies which involve only simple questions of fact, the exercise of ordinary judgment or common sense, or the expression of popular desire. Liquor prohibition laws, soldier bonus laws, bond issues exceeding public debt limits, and similar questions are typical of this class of problems. Since these are mainly questions upon which most people have convictions, or which involve processes of reasoning and questions of fact well within the range of the average person's interests and experience, a real public opinion in regard to them generally exists. The formulation of such policies in an effective and satisfactory way frequently requires technical skill and experience, but when once formulated, public opinion may operate upon them directly and effectively. Referendum votes on such issues are likely to represent true opinion, and may, therefore, in such instance, be regarded as real instruments of popular government.

Obviously the public may also exercise its control indirectly through the choice of political leaders and representatives, but there are some cases where direct action would seem preferable. Where a proposed policy, coming within this class, is one which will invoke a hostile resistance, it is important that it should not become law until a clear public opinion has been mobilized in its support. For unless this is done it will not be enforced. The enforcement of such a policy requires a much stronger public opinion behind it than is required for its mere enactment. This is especially important in such matters as liquor prohibition laws, where the lax enforcement has been notorious and its evil effects disastrous. To the extent that direct action will prevent such catastrophies, it is not only effective but desirable.

The foregoing discussion prepares the way for the consideration of the question of the duty of a popular representative. In his official conduct, should he act according to his own judgment and convictions, or should he defer to the wishes and opinion of his constituents? Should he be a mere delegate to register the opinion of his district, or should he be a representative, exercising his judgment in behalf of the people he represents? There are three aspects of this problem, the first dealing with campaign promises or party pledges. Common honesty would require that a man fulfill his personal pledges, and those of the party that he represents. But this does not dispose of much of the difficulty, since relatively few questions are covered by campaign promises or party pledges.

The second aspect of this problem is concerned with the party caucus. Should a representative vote his own convictions or abide by the judgment of the party caucus? This will necessarily depend upon the extent to which the theory of party responsibility is adopted. In England where this theory is frankly adopted, the caucus generally controls, while in America much greater liberty is left to the individual judgment. With the rapid increase in the technical and complex character of our government, the theory of party responsibility is becoming one of increasing importance, as the only effective way in which public opinion may function in such technical matters as foreign policy, tariff legislation, and the coördination of the legislative and administrative functions of government. It is extremely difficult to comprehend how a nation-wide public opinion can function in the complex problems of the federal government without the doctrine of party responsibility definitely established. This means the power of the party caucus must increase.

The third aspect of this problem is the question of instructing the representatives and whether they should follow such instructions or follow their individual judgment. Much will depend upon the manner in which the instruction is given. Some states have what are called public opinion referendums, in which the people may vote upon a proposed policy, not with the purpose of enacting it into law, but merely for the purpose of advising their representatives. If the policy is one upon which a public opinion is possible, and the vote seems to indicate that it represents a real opinion, there would seem to be good grounds to argue that the representative should be bound thereby. But if it is one of those questions upon which a public opinion is not possible, the argument would seem equally strong that the representative should vote his own convictions. A popular vote upon a subject upon which a public opinion does not exist is merely leaving its determination to the vagaries of popular fancy, or what is still worse, to the clever manipulation of those special interests which have a selfish motive in controlling the result through the art of publicity and suggestion.

Where there is no formal and effective manner of registering public opinion, but it is left to the mere voluntary action of the individual, the doctrine of instruction becomes much more difficult to apply, and much more capable of abuse. It rarely happens that any considerable number of the people take sufficient interest in public affairs to indicate to their representatives their opinion upon pending issues. Any instructions thus given consequently represent but a minute fraction of the population. Moreover, those that are represented are more likely to be those whose personal or selfish interests dictate their opinion, rather than those whose only interest is in the public weal. Former Senator Husting of Wisconsin testi-

fied that during the months previous to America's entry into the war, the German-American Alliance sent thousands of telegrams urging a conciliatory policy toward Germany, until it appeared that such was the overwhelming demand of his constituents. Those whose only interest was the general welfare of America very rarely expressed to him their beliefs, although, upon investigation, he was convinced that they were in the vast majority. A governor of a Western state once told the author of an incident illustrating the same idea. He was fighting for the enactment of a measure regulating the liquor traffic. He had his office force tabluate the letters, phone calls, and telegrams according to whether they were for or against the legislation. The results were about twenty to one against the legislation, although the governor had been overwhelmingly elected upon a "dry" platform. Under such a system of instruction, the determined organized minority, dominated by selfish and even sordid motives, occupies a position of vast strategic strength.

Moreover, regarding complicated and technical questions, it is reasonable to suppose that the representative, who is giving his full time to the study of these problems and the method of their solution, will devote greater interest and a more intelligent understanding to the solution of the problems than will the great bulk of the public who view the vast majority of public problems both with indifference and a lack of adequate background. Under these conditions, the overwhelming weight of the evidence is against the doctrine of instruction and in favor of the representative acting in the interest of the community, according to the dictates of his own judgment and convictions. The public can hold him responsible for results obtained much more intelligently and effectively than they can direct the details of his various duties.

From an analysis of the functions of modern government and an examination into the nature and possibilities of public opinion, it seems clear that in the large majority of cases popular control can be effective and beneficent only when applied through the indirect methods of representative government. It is in the choice of leaders that the voice of the multitude becomes the most articulate and intelligent; it is only in evaluating the results achieved that they may have a real opinion regarding the merits of technical legislation; and it is only in the choice of methods that they can make contribution to the accurate determination of questions of fact. It is in the relatively small class of problems which involve only matters of general information and common sense that direct democracy can either register public opinion or secure intelligent results.

Professor Giddings has recently given a striking and statesmanlike summary of the relations of direct democracy to representative government. "While no way has been found, or is likely to be found, to make a democracy fool proof, experience indicates that the best working system is a combination of direct democracy with representative government. The town meeting has had an honorable record. It has been a good school. In the commonwealths great issues are discussed and thought about by all citizens, and are most wisely decided by popular vote. But for legislation in general and for efficient administration, some degree of expertness is required. Positive talent is called for, and a politically organized population makes a fatal blunder when it does not delegate these duties to selected men; a truth that always has been recognized in the town meeting itself which, while voting on the particular items of business set forth in the

warrant, has also elected 'selectmen' to carry out the popular decisions.

"Nothing would so improve the quality of American politics in these days of unrest and experiment as a sound understanding of the nature of representative government and the common sense reasons for it. The problems of legislation and public policy were never so difficult as now. They are of baffling complexity, while at the same time their solution is imperative. They involve enormous financial risks and burdens. They call for the most delicate adjustments of social rights and duties. They include the tremendous interests of health and education, of prosperity and peace. They demand, therefore, that before the public by referendum or otherwise gives its final verdict upon them, the most patient and intelligent study and the fullest discussion be given them. This is equivalent to saying that they call for initial handling by men of demonstrated ability, selected from the great body of citizens and entrusted with both discretion and responsibility."[1]

[1]F. H. Giddings, "Understanding Our Government" in *Independent*, Vol. 101, p. 433.

SUGGESTIVE QUESTIONS FOR

CHAPTER III

I. "Public Problems are increasing in complexity more rapidly than popular education is preparing the public with the technical information to solve them." If the above statement is correct, does that mean the end of popular government?

II. "The referendum is a desirable reform because it is more democratic than the existing system." Criticize this argument.

III. What general considerations should prevail in determining whether any particular reform should be adopted?

IV. What is the real purpose of government, to preserve democracy or to see that justice shall prevail among the people? To what extent and in what sense are the two purposes identical?

V. "Those who oppose the referendum are opposed to democracy." Criticize this statement.

VI. How far should our system of representative government be supplemented by the instruments of direct democracy?

VII. When a man has the reputation of being the best lawyer in the community, upon what basis of judgment is the opinion of the community formed? Do they so regard him because his opinion of the law coincides with theirs?

VIII. How much reliance may be placed in the community's judgments as to the efficiency of a physician? Why?

IX. "For a district to instruct its representative how he should vote on technical matters would be just as wise as for a patient to instruct a physician how to diagnose his own case." Is the analogy accurate? Why?

X. "If representatives allow themselves to be bound by the party caucus, that means the end of popular government and the substitution of party tyranny." Criticize the statement. Has it worked that way in England?

CHAPTER IV

THE DIRECT PRIMARY AND THE STATE NOMINATING CONVENTION

THE issue of representative government against direct democracy was strikingly presented in the recent growth of the direct primary and the agitation against the nominating convention. Originating in the outburst of histrionic statesmanship that sought universal panaceas in the devices of direct democracy, it sought popular support in the insidious flattery of the public. Its chief appeal was the capitalization of popular prejudice against the bosses, and its main defense relied upon vain sophistries regarding popular majorities and their assumed omnipotence. In other words, the direct primary was not the product of a careful and scientific analysis of the problem of party nominations, nor a constructive effort so to organize our political machinery that the public opinion of the party would function with maximum efficiency and beneficence. It was an attempt to make party nominations subject to popular control, without taking the pains to analyze the conditions inherent in the latter. In other words the movement was histrionic, rather than scientific.

Our state constitutions provided for the election of certain state officers, but made no provision for their nomination. But popular election, unless restricted to a choice from a very limited few, becomes an obvious absurdity. When the author was attending the public school, it was decided to have all the school children march to the ceme-

tery on Memorial Day. The boys in the author's class were asked to elect a captain to lead the march. A vote was taken by secret ballot, without any opportunities for the scholars to talk it over and develop any consensus of opinion. The result was that out of about thirty votes cast, most of the pupils received one vote, and the boy who was elected received four. He was the most cordially disliked boy in the group, and secured his election by exchanging promises with three neighbors to vote for each of them if they would vote for him, and then finally voting for himself. No one could possibly say that the election was an expression of the group opinion. If there had been two or three candidates from whom the voters could have made their choice, another more representative boy would have been elected. Nominations are thus essential to effective popular elections.

The people did not take long to realize that if they were to control the government of the state, they must organize into groups, according to political theories or prejudices, nominate a candidate and place the party label upon him, in order that the public might have a basis of judging him and of holding his group accountable for his conduct. It was the only way public opinion could function in the control of state government. Political parties originated in this very obvious necessity. Likewise, it was only through group effort that political issues could be formulated. The great mass of the people become articulate only when their leaders, seeking to interpret their thoughts and aspirations, formulate broad, general principles upon which they can vote with a "yes" or "no."

Moreover, the leaders soon observed a popular indifference and ignorance regarding political issues. If a group believing in certain political concepts desired to cause them to prevail, it became necessary for them to

carry on campaigns of agitation, education, and suggestion to win adherents to their cause. This resulted in the development of much elaborate machinery for the purpose of winning popular support, while the waging of political campaigns became one of the important functions of the political party. From the standpoint of the practical politician, the most important task confronting the party organization is to see that every member casts his vote at the election. It has recently been the fashion, among certain of the morally élite, to condemn political parties as unnecessary evils, and their organizations as necessarily wicked and despotic "machines," although one of the most important functions of this "machine" is to beg, cajole, and haul the indifferent voter to the exercise of his sovereign right. The author has observed many elections, where a very high percentage of the vote would never have been cast had it not been for the eternal vigilance of the politician and the activities of the "machine."

The performance of these three important functions—the nomination of candidates, the formulation of principles, and the campaigns of publicity—has called into being a very elaborate system of political machinery, with which the great parties must necessarily be equipped.[1] Without going into details, a modern political party may be described as composed of three hierarchies, the first a hierarchy of caucuses, conventions or primaries, dependent upon the election laws and party customs of the various states. There is at the bottom the precinct primary, mass meeting, or caucus, in which the members of the party select their committeemen, and perhaps their delegates to the county and state convention, if the local convention system is still in use. Then there is the county

[1]For a discussion of the organization of political parties, see Ray, *An Introduction to Political Parties and Practical Politics* (2nd ed.).

convention or primary, the state convention or primary or both, and the great national convention. In addition, all other electoral districts, such as congressional districts, state legislative districts, cities, etc., have their primaries or conventions, to nominate their candidates, choose their party officers, and frame party issues.

The second hierarchy is the system of committees, beginning with the precinct committeeman and running up through the township, county, state, and culminating in the national central committee. While this line of committees forms the backbone of the national party organization, there are also committees for all the other electoral districts and political subdivisions of the state. It is the business of these committees to look after the party interests, wage the campaigns, arrange for conventions and primaries, when not provided for by law, and look after all the administrative details of party activities.

The third hierarchy is found in the groups of party leaders or political bosses. These are the men, who, by virtue of their dominant personalities, executive ability, and capacity to handle men, are the real moving spirits in party affairs. They may be party committeemen, public officers, or merely practical politicians whose political skill, devotion to party interest, and commanding personalities have given them dominant positions in the counsels of the party. In this respect political parties are no different from other groups of individuals. Every successful church has its little group of men whose loyalty to the organization, whose personality, executive ability, and interest in its achievements, make them the dominant forces in shaping its destiny. We call them the pillars of the church. Every successful commercial club has its little coterie of leaders, men whose vision, forcefulness, and devotion furnish the leadership, the dynamics, and

the efforts that insure success. We call them the leaders of the community, the "live wires" of business. But for the men who take the dominant interest in politics, do the work, furnish the energy and supply the leadership, we reserve unmeasured condemnation. We call them "bosses." We are told that they are petty, partisan, selfish, and occasionally corrupt. But these qualifications are not peculiar to politicians. They are, unfortunately, peculiar to the human race.

As contemptible partisanship as the author has ever seen has been at a church convention, and yet he is an enthusiastic churchman in spite of it. He never knew a church, a commercial club, or any other kind of organized group that did not frequently forget its ultimate mission or goal and become entangled in the meshes of partisanship, selfishness, and bigotry, and yet these institutions are important forces in our community life. We do not propose to abolish them because of these evils, nor to rob them of their leaders because frequently they may be partisan or tyrannical. The same wholesome attitude toward political parties will aid greatly in approaching intelligently the problems that they present. We can no more abolish leadership in politics than we can in education, industry, or the church. Much fine-spun theory has been evolved from time to time, discriminating between political bosses and leaders, but it is useless. For purposes of practical politics the distinction is obvious. The dominant personalities in my party are leaders, but in your party they are bosses. The political arrangements of my party constitute an organization, but a similar arrangement in your party becomes an iniquitous machine.

To wage a fearless campaign against the bosses is quite as heroic as the chivalrous attack of Don Quixote

against the windmills. And yet much splendid energy has been exploited and vast resources of moral indignation squandered in sham battles, which a credulous public has thought were real. The following quotation from Mr. F. A. Cleveland gives a discriminating and accurate statement of the place of the boss in our political system. "An American political 'boss' is commonly one of the most intelligent and efficient citizens that we have. His guiding motive may not be the public welfare, but he has had a clearer concept of the essential factors of democracy than has the reformer who dreams of high statesmanship in terms of abstract morality, but who lacks the touch and balance of facts about the everyday life of the people. 'The boss' is the only one who makes it his business to know what is necessary to supply the community needs which are brought home to him. He has been the only one who has had a comprehensive citizen program. To the Tweed and other 'graft' organizations New York owes much that is best in the development of municipal life. It has been under the rule of 'the organization' that Philadelphia has developed practically all that may be considered the product of a well-considered constructive program. This has not been accomplished in response to ideals of public service in the 'organization,' but as a means of getting the support of those who want public service. It is this that commends 'the boss' to the people. He makes provision for systematic contact with citizen activities, citizen opinion, citizen interest in order that he may have the information necessary to win the suffrages of a less intelligent electorate, thereby obtaining for himself and for his organization the chance to exercise for partisan and personal ends powers which carry with them the use of funds and properties entrusted to officers of government. 'The boss' has made citizenship his busi-

ness. With the reformer, citizenship has been only an emotion."[1]

As our public problems have become more complex, as the number of popularly elected officers has been enlarged, and as the machinery of government has become increasingly intricate, the importance of the political boss has necessarily kept pace. For with the enlarging burdens thrown upon the electorate, and without a corresponding increase in civic interest and intelligence, the boss has fortunately come in to do what the people would not or could not do. The problem confronting the practical student of politics is not, therefore, the elimination of the boss, for that is impossible so long as political parties continue to afford the only practical method of popular control. The real problem involved is twofold. We may so reorganize our political system that the excess burdens now thrown upon the voter, and which the boss assumes, should be placed upon responsible officers, who may be held to both legal and political responsibility. Or we may still farther perfect our party system, giving the organization fuller power, and establishing a definite doctrine of strict accountability for the party and its boss. Bosses and parties we must have, but we want to fix their responsibility so definitely and completely that public opinion may function effectively, when it will, in demanding a better type of leader, and a higher standard of service. The question as to the type of boss and the character of his public service is always the vital, fundamental issue. We have had bosses who have been corrupt, cruel, despotic, and immoral, and we have had others who have been clean, patriotic, and efficient.

The party system as it has evolved in America has developed many evils, some of which have been already

[1] *Organized Democracy*, pp. 443-44.

noted. The party officers and leaders do not always seek faithfully to interpret public opinion but frequently seek to falsify it from partisan or selfish motives. They frequently sacrifice the public good for partisan expediency. By the spoils system they have sought to perfect their political strength at the cost of the public service. They frequently and deliberately seek to confuse the issues, in order to protect a selfish or a sordid policy, and yet escape detection. The evils of graft and inefficiency must be checked up against the parties in power, just the same as the credit for constructive and patriotic achievement must be granted them.

When we consider the vast importance of the three great functions performed by political parties, together with the possible evils and abuses of the party system, the question of party responsibility becomes a matter of paramount concern. It is only by holding them to the doctrine of strict accountability for the results obtained that the public can safeguard its legitimate interests against the evils of partisan abuse. Under our form of government no party organization can retain its power save by popular support. No boss can continue his rule longer than the people will elect his party and candidates to power. The successful boss always pays the price of popular support. The difficulty is that, frequently, the people exact too low a price. They are so indifferent that they are satisfied with the minimum of public service, leaving much of the public business to be done according to the selfish interests of the boss and his machine. How the public may be aroused to demanding more is an important question but outside the scope of the present work. How such a demand may be easily and effectively made, when the public so desire, is the problem with which we are here concerned. In the solution of this problem two things are

fundamental. First, we must give to the party organization and its members full power in the performance of those functions assigned to them. Secondly, we must protect the organization and its members against dishonesty and corruption from within and from the alien interference of competing parties from without. We cannot fairly or intelligently hold them to strict responsibility for tasks in the performance of which they are not given sufficient power, or where they are not protected by the state against the fraud and dishonesty of their own members, and the demoralizing influence of their political foes. In the main, political parties are given full power and responsibility. Most states have provided corrupt practices acts to safeguard party procedure from dishonesty and graft, and most of the states either protect the party from alien interference or at least permit the party to protect itself.

On the other hand some states, such as Wisconsin, have adopted an open primary, in which any elector has a legal right to vote in the primaries of the opposing party. If the Democrats have no fight in their own party, which is frequently the case with a minority party, their partisan interests can best be served by voting in the Republican primaries for the poorest candidate, in order that the Democrats may have an easier opponent to defeat. In a recent senatorial primary in Wisconsin, many Democratic precincts voted almost solidly in the Republican primaries in favor of a candidate for the Senate, whose attitude on the war was regarded by pro-war advocates as unsatisfactory, realizing that if such a candidate could be nominated *for* the Republicans, the Democrats might expect a victory. Other incidents of similar nature can be cited. Under such a system, party responsibility becomes impossible. The only alternative, in order

to secure a responsible government, is for the people to take over themselves many of the tasks they have been leaving to the machine and its bosses. But this they have shown that they cannot and will not do. They will not watch carefully and eagerly all the details of the public business, in order to know what officers may be right and what ones are wrong. They have demonstrated time and time again that they cannot and that they will not bear such burdens. The establishment of party responsibility, therefore, as a fundamental principle of popular control seems indispensable under all the circumstances of the case.

Among the most controverted changes that have been made in party machinery, in order to meet the evils above suggested, as well as certain specific evils inherent in the convention system, is the direct primary. Before the direct primary made its appearance, state officers were nominated by party conventions, and party committeemen were chosen in the same manner. Because of boss control, the undue influence of predatory wealth, the manipulation of the delegates by professional politicians, the quality of delegates attending the conventions, and the various other types of partisan abuse and public indifference, the direct primary has been adopted in many states and the state convention abolished, or its functions greatly limited. The fundamental change consists in the people's attempting to do directly two things that formerly they left to the conventions, viz., the nomination of candidates and the election of party officers and committees. The formulation of platforms is generally left to a convention composed of all the candidates for office, or to be a convention composed of the party committee and the party candidates, or to a form of the initiative and referendum among the party voters. The state nominating conventions were composed of delegates elected from certain

selected subdivisions of the state, either elected directly in primaries, or elected indirectly in local conventions, by the voters of the party.[1]

Thus the direct primary as a substitute for the state convention raises directly the fundamental issue of representative government as against direct democracy, in the selection of party candidates for public office and the appointment of party officers and committees. That the members of the party should control in both of these matters is admitted. The real question is then how can that control be most effectively and intelligently exercised. Under which system will the public opinion of the party be most effectively expressed, and the doctrine of party responsibility most adequately guaranteed?

This requires an analysis of the task to be performed. It consists in the selection of candidates for the various state officers, which include judges of the higher courts, state superintendent of public instruction, treasurer, auditor, attorney general, governor and lieutenant governor. In addition to these, many states elect some of the following officers: State statistician, members of railroad commission, state geologist, and clerk and reporter of the supreme court. The state officers and committees of the party are also elected. Take for example the nomination of a party candidate for state statistician. There are possibly fifty men in the state of sufficient technical training, character, and general equipment who are capable of filling that office with varying degrees of satisfaction. But unless one of these men has secured some unusual publicity, quite uncommon among men of that profession, it is a safe estimate that there are not five thousand citizens in the state who know any one of these fifty men

[1]The best discussion of the direct primary will be found in C. E. Merriam, *Primary Elections.*

with sufficient intimacy to pass an intelligent judgment upon his qualifications for the office. In a state of 3,000,000 population, this means that less than one-sixth of one per cent. of the population will have intelligent information regarding any one of the fifty men. But this is not all. An intelligent selection of one from this fifty involves not merely a knowledge of one of them, but a knowledge of the relative merits of each of the fifty, in order that the best one may be selected. Now it is obvious that there will not be one one-hundredth of one per cent. of the voters of the state who will have any reliable acquaintance with a dozen of the fifty, to say nothing of an adequate knowledge of them all. To meet this situation only the names of those persons are placed upon the primary ticket who have secured petitions bearing a certain number of signatures. But the evidence shows that petitions are generally signed as a matter of course and are not based upon the signers' supposed knowledge of the relative qualifications of the possible candidates. The candidates who are eager enough for the job, or whose friends are, are the ones placed upon the ticket. They may be the worst or the best from the list, there is no way of determining. It is a pure matter of chance. Yet under the direct primary system some one will be nominated by the party voters from this list of candidates, with no one responsible for their selection, for this office of state statistician, although not one-sixth of one per cent. of those voting have a reliable firsthand basis for an intelligent choice.

The same situation in general exists in relation to the office of state geologist, members of railroad commissions, clerk and reporter of the supreme court, state treasurer, auditor, members of the supreme bench and state superintendent of public instruction. In regard to some of

these offices, the available men may be known to a larger number of people than is true in case of the office of state statistician, and yet there is no evidence to suppose that in any case, with the exception of the candidates for governor, that the number of those in a position to pass an intelligent judgment will exceed one-third of one per cent. of voters. In a lecture trip through a direct primary state several years ago, the author put the following question to twenty-one audiences that averaged about one thousand persons to an audience: "How many persons in this audience had any reliable, authoritative information regarding the personal fitness and technical qualifications for office of any candidates on any ticket in the last state primary, with the exception of the candidates for governor, and with the further exception of any candidate that might happen to reside in this community?" There were on the average three in each audience who felt that they had such authoritative information. It is interesting to note that in most cases those three were local politicians.

This would seem to indicate that such a thing as a public opinion on the best candidate for most of the offices for whom candidates are nominated is wholly and absolutely impossible. The problem here that is submitted to the voters is a question of fact, viz., who are the men in the state best fitted for the offices to be filled? In the preceding chapter we have seen that there can be no public opinion on the determination of such matters of fact and judgment. We might have a public opinion on the best method of determining that question, or public opinion might function indirectly, by selecting local political leaders whom most of the voters may know, sending them to a state convention, and asking them to pick the men, in conference with other local representatives and the

party leaders of the state. Public opinion could then test the work done and function on the results achieved, and hold the party to strict accountability for the work of the men that they had chosen.

In other words, the question of who is the best available man for the office is not a matter of philosophy upon which the voter may have conviction, nor is it a question of common sense and general observation, nor is it a question upon which any number of the voters will take the time to investigate the material facts and come to a real opinion of their own. This is amply illustrated by the large number who have no reliable information regarding the candidates from whom they have made a selection. In regard to the vast number of officers nominated by direct primaries, therefore, there is no public opinion in existence. It is either a mere matter of chance, caprice, accident, or suggestion, or an organized competition in the art of hired publicity with their traditional attempts to capitalize prejudice, ignorance, provincialism, impatience, or unrest. The type of publicity resorted to in these primary campaigns, especially in regard to the minor officers, is quite frequently pure demagoguery and not education. The direct primary, so far as it has to do with other officers than that of governor, can scarcely be called a device of popular government, if we are to adhere to the statement that popular government is that in which public opinion is in control. The only way in which public opinion could possibly control in such a case, is, as has already been suggested, indirectly through the selection of local delegates to a state convention, followed up and checked with the theory of party responsibility for the results of the administration so selected. If the delegates to a state convention are selected from small districts, at a legal primary election, under all the safeguards

of law, the people have an opportunity to select at least one of their number who enjoys the confidence of the community, who will take part in nominating a list of candidates. They will normally select a local politician, who is more or less in touch with the political situation, and who is likely to know something of the men who are available as candidates for public office. He will have an opportunity to meet them all at the convention, where the candidates have headquarters to which delegates are cordially welcomed, and presented with all the arguments in favor of each candidate and against the rest. In addition, the delegates will confer with the state party leaders, and will be greatly influenced by their advice. On occasions they will slavishly follow such advice. In fact, it is the influence of the experienced party leaders, who have been studying the situation for months, that may be the most valuable. It is undoubtedly true that these leaders occasionally dominate the whole situation by a system of political manipulations and that bad candidates are deliberately chosen. But if this happens it is because the people of the various communities have selected as their delegates men who can be controlled, manipulated, or hoodwinked, and furthermore, it is because the shrewd party leaders know that the public will not be awake enough to hold the party responsible for results achieved. For party leaders want political power above all things on earth, and if the public demands a high-class list of candidates, one that will give splendid results when entrusted with power, the party leaders will not only make it their personal business to see that it is done, but they are the one group in the state whose experience in judging men, and whose knowledge of the possible candidates for office, and of the nature of the public business to be done, has best equipped them to make these selec-

tions the most efficiently and the most unerringly. It is indirectly and through such means, therefore, that public opinion can function and function with effectiveness and dispatch.

Moreover, under such a system, where there is a public opinion in favor of good and efficient government, there is always the party organization, composed of the ablest and most alert of the politically informed men of the state, who are always "on the job" to see that the officers whom they nominated, and for whom the party must answer in the future, do their work and do it well. Any careful observer of politics can cite innumerable examples where the party organization has come to the rescue of a weak public servant in order that the party might be spared the criticism and hostility that inefficient government could bring upon them. In a direct primary, where the party leaders have less to say, party responsibility is much less secure, and where there is the open primary, it tends to disappear entirely. If the organization is deprived of power, it can scarcely be held responsible. The voter has nothing more stable to rely upon than the ambition and integrity of the candidate blindly nominated by a group of voters who knew little of his qualifications or fitness. Public indignation may blaze forth from time to time, but it can have nothing to operate upon except to turn a few luckless candidates out of office and put in a group of new ones about whom it knows little. Under the convention system and the theory of party responsibility, when public indignation blazes forth, it is against a party in power, which will not soon forget their loss of prestige and which will seek to make amends in framing the best ticket that the most skillful political leaders and the wisest statesmen of the party can select, and in seeing to it that they do not too soon become weary

of well-doing, so long as public opinion is demanding actual results as the price of their support.

If public opinion is indifferent, it is true that under the convention system the political leaders tend to run things to suit themselves, so far as they are able, while an irresponsible press or the publicity makers in the employ of those who have the financial means to command them tend to dominate the nominations under a direct primary. It makes little difference, where the public are indifferent, which system is in vogue. But when public opinion develops a real demand for efficient government, it is through the convention system that such a demand can be the most efficiently expressed, and the most effectively followed up.

In view of the fact that the primary election does not record a public opinion in the choice of the great majority of candidates so nominated, then what is the effect of such a method? When popular pluralities control in regard to matters upon which public opinion does not and cannot exist, what forces determine the selection of candidates? In previous chapters we have seen that the results are determined largely by accident, suggestion, newspaper cartoons, leads and headlines, and the popular caprice or vagaries of the moment. Most of the arguments in favor of the direct primary have to do with three propositions, viz., first, that it selects a better type of candidates; secondly, that it is the best instrument of popular control; and thirdly, that it is essential to the dethronement of the political boss. Let us examine those three claims in the light of the fact that most nominations by the primary do not represent real public opinion, but are necessarily determined by the capricious and unreliable forces above mentioned.

Does the direct primary tend to secure a better type of candidates? Does a plurality of votes, undirected by a genuine public opinion, as is the case in reference to the great majority of officers, secure better results than a convention? When the public are not interested, neither system will give good results, but when the public really want able, competent men for office, under which system will they be most likely to obtain them? The first observation is that the primary places a large premium upon qualities of publicity, which are generally more common among superficial than among profound men. Since such an infinitesimal portion of the voters has any reliable information about most men for whom they vote, the man who can secure the most publicity, who is the most picturesque, and can make the front page of the press the most frequently, is the one most likely to be secured under a system where caprice, accident, and suggestion are the controlling factors. Very likely the most scholarly jurist, with the most judicial poise, will be the one who attracts the least publicity and gets the fewest votes, while the effective seeker after notoriety, who has mastered the art of publicity and who will get the largest vote, is not likely to be nearly so scholarly, learned, or judicial. It would be very unusual for a man of this type to be a man well suited to survive the rough-and-tumble game of direct primary publicity. In a convention, the leaders will be alert to pick such men on their judicial ticket and they will do so, if there is a popular demand for efficient judges, for they cannot afford to do otherwise. Many cases have come under the author's observation where men have been nominated for office without any effort being made by them, merely because the convention wanted strong men to strengthen their ticket before the public. It is needless to observe that such things can scarcely happen under the

primary system. Mr. Allen H. Eaton in commenting upon the direct primary, has found such to be the case in Oregon. "Another disadvantage which applies particularly to thickly settled localities where candidates are not known to the voters, is that the candidates are not sought out by the electors; that is, the office does not seek the man, but man almost invariably seeks the office. With no provision by which the qualifications of the candidates are to be considered by the political organizations, with no organizations to weed out men for official positions, with the active political leaders of yesterday out of the field entirely, the result is that men generally become candidates upon their own initiative."[1]

Professor Frank E. Horack, writing of the primary elections in Iowa, declared that "the primary election returns seem to justify the statement that in 'counties where a contestant's name appeared first on the ballot, he invariably carried that county.' "[2] Where the public are asked to vote on matters concerning which they have no opinion, it is not surprising that such trivial factors may determine the results.

Another consideration affecting the type of men selected by the primary is the item of expense. Any observer of politics can recount innumerable incidents of persons nominated under the convention system with but little or no expense to themselves, merely because the convention did the choosing. While it is true that fortunes have occasionally been spent seeking nominations under the convention system, it was unusual. On the other hand it is almost impossible for one to win the nomination to state office under the direct primary without a very large expense. While this has been denied, the truth of the statement seems amply vindicated by the evidence.

[1] C. E. Fanning, *Selected Articles on Direct Primary*, p. 176.
[2] *Ibid.*, p. 182.

Mr. Eaton declared that "Some of the best men in the state of Oregon have practically bankrupted themselves in their endeavor to acquire office."[1] Professor Merriam, the accepted authority on primary elections, has observed "that the cost of campaigning where candidates are chosen by direct vote is greater than under the other system. In a delegate primary there are generally certain districts left uncontested, but where a few votes may turn the scale the canvass is carried into every part of the territory. The few supporters won in a rival's home territory may prove decisive. In addition to the expense of a personal canvass comes the cost of advertisements inserted in the newspapers, the circulation of literature, payments for expenses of meetings, for workers, for conveyances, and for other incidentals that aggregate a considerable sum. * * * Yet, if this expenditure is directed toward the education of the public, the outlay is on the whole desirable, provided the sum necessary is not so great as to exclude or unduly obligate the poor man."[2]

When the form of publicity generally used in these campaigns is carefully analyzed, it will too frequently be found to consist of the "scare head," "display," or merely suggestive type that has no educational value, but which tends to produce an unconscious bias, by a non-rational process, in favor of a given candidate. Only the man already in office and well known, or, who, for some other reason, has been able to attract an unusual degree of notoriety, can attract the favorable attention of enough voters to enable him to secure a state nomination, without a very large expenditure of money, if there is any real competition for the office. This necessarily places a great power into the hands of those who have the selfish interest and the financial power to command the instru-

[1] *Ibid.*, p. 176.
[2] C. E. Merriam, *Primary Elections*, p. 119.

ments of publicity. With the overwhelming majority of the people ignorant regarding the several candidates, it is not difficult to create by skillful suggestion a popular fancy in favor of some candidate who may be utterly unworthy, if not vicious. This will not so easily happen in a convention, where the politicians and political leaders will be on the alert to detect the presence of any candidate whose nomination would prejudice the future interests of the party. Again it should be observed that if the public is indifferent, even in regard to the results achieved by any administration, selfish, narrow, and occasionally corrupt interest will prevail, regardless of the system that is employed.

The next consideration to be noted is the statement that the direct primary "possesses a great advantage in that it offers an opportunity for the defeat of a conspicuously unfit candidate." This may be true if there are but two candidates and if there are no highly organized interests backing the conspicuously unfit man. But unless there are such selfish interests, such a candidate would easily be defeated under any system, and if there are, the direct primary gives him his best opportunity. For instance, in the first congressional elections after America entered the war against Germany, a number of congressmen were considered by the general public as conspicuously unfit by reason of their war records. Now suppose that there were a number of pro-war candidates in each district eager to run against the conspicuously unfit candidate, and they had done it, the pro-war vote would have been distributed among the loyal candidates, while the anti-war votes, backed by such a powerful but secret organization as the German-American Alliance, would have been concentrated upon the one candidate, who

would have easily won the nomination with a plurality of the vote, although the public favored some pro-war candidate. If the pro-war vote were not divided, it would be an easy matter for the organization of the anti-war voters to see that several popular pro-war candidates were brought into the field. This is very easy where hired publicity plays so large a part, and it is frequently done. This situation could only be avoided by the pro-war voters holding congressional district conventions, nominating a pro-war candidate, and then electing a committee to campaign for his nomination. This was done in several districts and with marked success. This simply meant that if a majority of the voters were to have their way in the primary, and to defeat a conspicuously unfit man, they were compelled to resort to the convention system, thereby adding additional burdens, expenses, and difficulties to an overworked electorate. Under the convention system an anti-war candidate would have had no chance whatever, so long as public opinion was the other way, for no political organization would have dared to permit the nomination of such a candidate.

One final matter deserves consideration, and that is the alleged tendency of the primary to secure the renomination of the existing officers. To those who suffer from a chronic fear of political machines, this would be a serious charge, while to those who recognize that no machine can control a free people against its will, it will seem an argument in its defense, for surely the presumption should be in favor of the candidate who has had experience in the performance of his official duties. In theory and in practice the primary seems to give the advantage to the existing officer, since his official office has brought him a degree of publicity which others are not so likely to enjoy.

We come now to consider the primary election as an instrument of popular control. Is the primary a better method than the convention for the registering of public opinion, for we have seen that the essence of popular control consists in the dominance of public opinion? But we have also incontrovertible evidence that in regard to the great majority of candidates for state office, there is no such thing as a public opinion regarding their qualifications for office. Public opinion can only function then indirectly through the selection of local political leaders, who in turn will select the candidate at a state convention. The public can then test the action of the leaders and the party by observing the results of the convention and the administration that follows, holding the party to strict accountability therefor. Regarding the great majority of offices, therefore, it seems undeniable that popular control is possible only through the convention system, unless one accepts the extreme and rather bizarre theory that a plurality of votes, the overwhelming majority of which were cast in ignorance of the relative qualifications of the several candidates, constitutes the essence of popular government.

Another element in the question of popular control is the fact of minority nominations. In order to avoid the expense and trouble of two primaries, most primary laws provide for nomination by plurality vote. The evil of this was evidenced by the examples afforded by our recent experience in selecting candidates for congress where the war issue was involved. Without the preliminary convention the primaries in some of the congressional districts would have resulted in a decisive victory of the anti-war sentiment, although the majority of the people were of the opposite opinion. Six years ago there was a struggle between the radical and conservative wings of

the Republican party in the Wisconsin primaries. The conservatives held a convention, nominated a list of officers, and arranged for a committee to have charge of the campaign in the primary election. The radicals disdained the iniquitous convention, allowed two or three candidates to contest the office of governor, with the result that the conservatives nominated the governor by a plurality, although at that time a majority of the people favored the radicals, as was evidenced by the fact that a majority of the votes in the primary were cast for radical candidates. These results, which are by no means unusual, would have been impossible in a convention where the balloting would continue until one of the candidates secured at least a majority of all delegates present.

One of the reasons commonly urged why the primary is the more effective instrument of popular control, is because it is contended that a much larger proportion of the people participate in the direct primary than take part in the selection of delegates to a convention. That there is a much larger popular participation in the primary than in the convention seems amply established by the evidence. Undoubtedly this is a good thing in itself, but its real significance must be determined by the results achieved. Where there is almost total ignorance regarding the relative merits of the candidates, with the exception of the candidates for governor, perhaps the larger popular participation loses any real significance.

The last aspect of the question of popular control to be considered is the question of party responsibility. With so many candidates to be nominated, and with the almost complete ignorance on the part of most voters regarding most of the candidates, party responsibility looms rather large as a means of popular control. Normally the party leaders and delegates are in a position to select

a good ticket, if public opinion so decrees. Many thoughtful observers have long felt that in the complexities of modern politics, party responsibility afforded the most effective and practical method of popular control. Certainly it is a most important one, in view of the conditions that are known generally to prevail. It seems obvious that party responsibility will be a more potent factor in the convention system, where the convention is composed of the party leaders selected from the various communities of the state, and where the process of deliberation and exchange of views may be utilized, and the counsel and advice of the most astute and wisest leaders may be secured, than in a direct primary where those responsible for the leadership of the party and the control of its destiny do not occupy a position of such commanding influence. For it must not be forgotten that progress in a democracy depends upon the leadership of the few, rather than upon the popular standards of mediocrity. And it is in this leadership, checked by real sense of party responsibility to the public, and finally endorsed or repudiated at the polls, that there seems to be the best promise of genuine popular control along the lines of constructive improvement. Therefore anything that detracts from the possibility of party responsibility seems to interfere materially with popular control.

Where the primary law provides for an open primary as in Wisconsin, party responsibility tends entirely to disappear. In the Wisconsin primary for the election of delegates to the national convention in 1920, there were two lists of delegates contending for the election. One group were the LaFollette delegates and the other group was headed by Governor Phillip. The LaFollette delegates were elected. Shortly afterwards, Mr. Victor Berger, the leading socialist in the state, declared that since

the socialists had had no men in which they were interested, the socialists had entered the Republican primaries and voted for the LaFollette men. An analysis of the vote bears out the statement. The contest was sufficiently close in some districts that the socialist vote could have changed the final result. Under such conditions it is impossible to hold the Republican party responsible for a result which neither the managers nor the members of the party brought about. Under our complicated electoral system, the loss of party responsibility is a matter of more than passing importance.

Finally let us examine the primary as an instrument for the dethronement of the political boss, and the abolition of the professional politician. As previously observed it is futile to talk of the abolition of political bosses or leaders. So long as human nature remains unchanged we will have leadership in all phases of human affairs. The hope of democracy rests in the political leadership that it will develop and stimulate. Under the convention system, the leadership is more or less definitely identified with the party organization, and operates with the full understanding that unless it merits popular approval at the ballot box, its power is lost and its prestige gone. The life of political leadership is thus conditioned upon popular approval. But under the direct primary, leadership becomes irresponsible and difficult to locate. The owner of a metropolitan press may provide the leadership that controls, but unlike the party leader, he is free from popular control. So long as his paper is ably edited and carries popular supplements, cartoons, and other "features," his circulation will increase, regardless of how incompetent may have been the candidates that he placed in power. A defeat of his candidates at the polls does him no material injury while defeat may ruin the career of the party

boss. So it is with the other makers and hirers of publicity. They operate free from the fear that their political power and career is subject to popular destruction, while the regular party boss, operating through the convention, must forever curry popular approval. The public may be indifferent and may tolerate inefficiency, tyrannical methods, and corrupt control of government, but it is only when the public do tolerate it that the boss will dare attempt it, for in his life and in his profession success at the polls is absolutely indispensable to his power.

Professor Henry Jones Ford has dealt with the relation of the primary to the boss in an instructive way. "One continually hears," he writes, "the declaration that the direct primary will take power from the politicians and give it to the people. This is pure nonsense. Politics has been, is and always will be carried on by politicians, just as art is carried on by artists, engineering by engineers, business by business men. All that the direct primary, or any other political reform, can do is to affect the character of the politicians by altering the conditions that govern political activity, thus determining its extent and quality. The direct primary may take advantage and opportunity from one set of politicians and confer them upon another set, but politicians there will always be so long as there is politics. The only thing that is open to control is the sort of politicians we shall have. * * * The direct primary does not remove any of the conditions that have produced the system, but it intensifies their pressure by making politics still more confused, irresponsible and costly. In its full application it is the most noxious of the reforms by which spoilsmen are generated, for it parallels the long series of regular elections with a corresponding series of elections in every regular party organization. The more elections there are, the larger

becomes the class of professional politicians to be supported by the community."[1]

Mr. Edgar T. Brackett touched upon a very important aspect of this subject when he declared that in "a convention of a hundred members, no boss on earth can carry it against fifty-one of such members, if they have serious wishes on the subject. If an elector has no serious notions on the subject, nothing will protect him. And, after all, I am not sure but that it all comes down to having serious notions and being willing to fight for them. There is no method of procedure that will make a lion into a sheep, or a sheep into a lion. And I want to lay it down as a postulate, that nobody is ever really bossed politically, who, way down in his heart (whatever he may say about it) is not willing to be bossed."[2]

From the foregoing it appears that the direct primary cannot abolish the political boss and the professional politician. They will flourish under either system. Moreover the political boss controls no one who is not willing to be controlled. The real and important question is then, under which system can and will the party leader or boss give the best service to the community? It seems clear that this would be under the system that holds him most completely subject to popular control, and which makes real public service the most nearly dominant motive of his career. It seems equally clear that this system is the convention system, where the professional politician and leader must stand or fall by the people's verdict. For in the direct primary, the dominant power may be vested in a man who owns a string of papers, but whom the public can in no wise touch. For example, is it better to have the delegates to the national Republican

[1] "The Direct Primary," in *North American*, Vol. 190, pp. 1-14.
[2] *Proceedings of the Academy of Political Science*, 1913, pp. 220-228.

convention instructed in preferential primaries, by a plurality of voters, the great majority of which have never made a careful study of the lives of the competing candidates, but many of whom have unconsciously acquired decided preferences through the clever cartoons and innuendoes of the press, without having a rational opinion of their own, or to leave these delegates and their leaders to thrash out the problem, aided by the counsel and advice of the ablest leaders of the party, the political careers of whom depend largely upon the wisdom and sagacity of their choice. In other words, should the dominant force be that of irresponsible newspaper publishers throughout the country, or the judgment and counsel of the party leaders who are best able to judge and who have their whole careers at stake?

Much confusion has resulted from the partisans of one system attributing all the evils that inevitably flow from public indifference to alleged defects of the other system. All the evil things said of the convention are doubtless possible where the public is indifferent to what takes place. The same is true of the direct primary under like conditions. But such matters are not in point. The real question is which system affords the public the most adequate and efficient machinery for the appointed task, when the public is aroused and determined that it will control. It makes no difference how strongly aroused the public may become, how intensely interested they may be, they will never reach the point where any considerable number will have the basis for an intelligent estimate of the relative qualifications of the competing candidates for public office, under an electoral system, where a large number of public offices, some of them requiring technical and professional training, are left to be filled by popular election. In such a task there is no public opinion that can

operate directly, and yet that is the only rational assumption upon which the direct primary may be defended, an assumption that is negatived by both sound theory and unquestioned facts. That means that public opinion, if it is to function at all, in such a difficult task, must function indirectly through the choice of local leaders, who, in a representative convention, will make the nominations that are required. These men, most of whom will be professional politicians, will be best acquainted with the various candidates for office, will have an opportunity to meet them, and to confer with others, mindful all the while that their political future and their party success depend upon the verdict of the people. Party conventions, like all other forms of representative government, may occasionally become corrupt, may become neglectful of the public interest and may defy the public will, but they do so at their peril, and the people have an effective remedy when they administer the sting of a political defeat. But when the complicated nature of modern politics makes demands upon the public in excess of their general interest, strength, or knowledge, human experience shows that if those demands are intelligently met, it will be only through the aid of those whose special interest, training, and aptitude has prepared them adequately for the task, and in applying to them, in the performance of their duties, the doctrine of strict accountability. Otherwise these functions will be left to the mercy of accident, whim, or caprice; the stimulating and invaluable forces of responsible leadership will be largely squandered; and the voice of mediocrity will be likely to prevail.

SUGGESTIVE QUESTIONS FOR

CHAPTER IV

I. A law was recently proposed in a Western state to abolish all political parties, candidates for office to be nominated by non-partisan petition. Discuss the wisdom of the proposition as applied to state officers.

II. Discuss the effect of a direct primary upon the principle of party responsibility.

III. What is the connection between party responsibility and popular government?

IV. What necessary part does the political boss play in the affairs of popular government? Illustrate.

V. It has been suggested that direct primaries be abolished and that a law be passed enabling ten per cent. of the party members to demand a party referendum on the ticket nominated by the party convention. Other candidates could be placed on the ballot to contest the nomination with those nominated by the convention, by petition. Discuss the proposition.

VI. It has been said that a primary election is a splendid device to eliminate a conspicuously unfit man. Discuss the statement.

VII. It has been customary in Wisconsin for one of the factions of the Republican party to hold a state convention composed of delegates selected from over the state to agree upon candidates to support at the primary election. This has been criticized as improper and contrary to popular government. Discuss.

VIII. Is there any vital relation between party nominating methods and the short ballot?

IX. A prominent newspaper in a recent editorial declared that to establish a party test in the direct primary law would interfere with the popular control of government. Discuss.

X. It has been contended that the two party system as found in England and the United States does not allow sufficient expression of public opinion and that several political parties would make the government more responsive. Discuss.

CHAPTER V

THE PRESIDENTIAL PRIMARY

THE framers of the Constitution did not contemplate the popular election of the President of the United States, nor did they foresee the political significance that would be attached to the presidential office. Their plans contemplated an election by an electoral college, the members of which were to be elected by the various states in such manner as the legislatures might direct. Such a scheme would not require the elaborate nominating machinery necessitated by direct methods of popular choice. But this scheme soon ceased to operate as it had been intended. Political groups soon sought to control the presidential election by bringing forth candidates before the election, and suggesting a list of electors pledged to their support, with the result that direct popular election by states quickly ensued.

This, together with the growing political significance of the office and its organic relations with Congress, has made a nation-wide party organization indispensable to the popular control of the federal government. Since the days of Jackson, the presidency has generally carried with it the assumption of political leadership. The House of Representatives has generally been engrossed in local and district matters rather than in those of national concern, while the Senate has steadily declined in popular confidence. Add to this the further consideration of the greater ease with which the public can watch the legislative program of the President and its more spectacular and dramatic appeal, and the reasons for his political

leadership become obvious. When a party is elected to power, the people inevitably look to the President, and not to Congress, for their legislative program and the redemption of the party pledges. They are generally too impatient to watch the roll call of Congress, and apply the political pressure at the proper point, for it is much easier and more interesting to hold the President responsible for all that follows. This attitude was naïvely evidenced by a typical remark of a distinguished citizen who declared in 1912 that he was supporting Mr. Roosevelt because he was the only man who could "run that bunch at Washington." As a result, the point of contact between the public and the federal government is almost entirely through the President. While the people directly elect the members of both houses of Congress, they have found it simpler, easier, and more effective to seek the results they want through the President and his party than through the discriminating choice of congressmen. It places a tremendous burden upon the President and a great responsibility upon the party organization, but it has been reasonably successful.

The matter of nominating a candidate for the presidency, the drafting of the platform upon which he will run, and the selection of the national party organization, thus become matters of the greatest national concern. Since about 1840 these functions have been performed by national party conventions, composed of delegates from every state, as well as of representatives from territories and colonial possessions. These delegates have generally been allotted among the states, two for each representative and senator, and elected either from the state or the congressional district as the unit of representation. These conventions have chosen the candidates for the presidency and vice-presidency and adopted the party platform. The

conduct of the campaign and the administration of national party affairs is vested in the national central committee, composed of one member from each state, the state delegations to the national convention selecting the state's representative on this body.

That grave abuses should develop in connection with party machinery, subjected to the tremendous stress and strain of national politics, is inevitable. These abuses in national politics are not unlike those that developed in connection with the party machinery of the state, and which have been very vividly described by Mr. Francis W. Dickey. "It is alleged that the party committees, which constitute the executive side of the party machinery and which are composed of county or district leaders, are constantly scheming to secure the election of delegates to the conventions upon whom they can count to serve their purposes. Assisted by an army of tributary politicians, beholden to them for favors or in expectation of future rewards, and supported financially by various interests seeking to turn the party organization to their own advantage, they are enabled to pack conventions with supporters upon whom they can confidently rely to do their bidding. Even should they fail to secure a convention whose personnel is exactly of the pliable kind to suit their purposes, the resources of the leaders are by no means exhausted. For a determined coterie of wire-pullers to obtain control of the temporary organization of a convention, and, with that advantage, of the permanent organization, is no difficult matter—especially when, as usually happens, their opponents work to no common purpose. A friendly committee on credentials will often ensure organization control by settling a sufficient number of contests in favor of the organization contestants. When it is considered how little attention is paid by

voters to the election of delegates to nominating conventions and how little an understanding the average voter has of the procedure of a convention, one does not wonder that the unscrupulous and clever politician succeeds so well."[1]

To meet these abuses, an attempt has been made to apply the principle of the primary election to the national nominations. The Democratic national convention in 1912 adopted the principle of the primary election of delegates to the national convention, either under party rules or state law. Subsequently the Republican party adopted a rule, recognizing the primary election of delegates when provided for by state authority. The Taft-Roosevelt controversy in 1912 led to the adoption, in one form or another, of the presidential primary, and by 1916, twenty-one states had enacted laws providing for this system.

These laws differed greatly and may for practical convenience be divided into three groups. The first group provided for the direct election of delegates to the national conventions, either by congressional districts or by the states, but making no provision for any direct expression of popular choice of candidates for the presidency. The second group of states provided for a preferential vote as to choice for President, but made no provision to bind the delegates to vote according to the preference there expressed. The third group provided for a preferential vote on choice of candidate for presidency, and sought to bind the delegates to the preferential vote. A fourth suggestion was made by President Wilson in his first annual message to Congress in December, 1913, in which he urged a federal law which would provide for the nom-

[1] "The Presidential Preference Primary," in *Amer. Pol. Sci. Rev.*, Vol. IX, p. 471.

ination of candidates by the direct vote of the people "without the intervention of nominating conventions." This recommendation, however, never received serious consideration.

The first group of laws has not encountered great opposition, especially where the congressional district is made the unit for the selection of delegates. Where the state is made the unit, then it is open to much the same objections as the state-wide primary, viz., that it is impossible for the party members of an entire state to have the information and acquaintance essential to make an intelligent or even a conscious choice, and, therefore, that the election does not and cannot represent the true opinion of the public. In other words, the state is too large a unit for the successful operation of real representative government.

It is the second and third groups and President Wilson's suggestion that have aroused the most violent opposition and to which we shall devote our attention. All of these suggestions raise the issue, more or less directly, as to whether the selection of party candidates for the presidency should be made directly through some form of preferential primaries or indirectly through some form of the convention system. In the nomination of presidential candidates, will the principle of direct democracy or of representative government yield the best results?

This raises the same fundamental problem as that presented by the direct primary in state politics, and many of the observations made in the preceding chapter will apply here with equal force. There are, however, certain important differences which we should note in this connection. Two of these differences operate in favor of the preferential primary, tending to make a direct vote more practicable in the case of presidential

primaries than in state nominations. The first difference is the existence of the short ballot in the federal government, with the result that there are only two federal officers to be nominated and elected. This means much less opportunity for wirepulling and intrigue in the convention than where there is a long list of candidates for many offices, with the consequent mass of political manipulation among the great number of candidates, that has so frequently characterized the deliberations of state nominating conventions. It is not unusual in state conventions to have a candidate for office from every section of the state. The delegations from each section frequently come pledged to their candidate, and they will vote on all other candidates in the way that will bring the best results to their local man, which means that the deliberations of the convention are largely determined by the political logrolling, deals, and trades that the various campaign managers are able to arrange. While this undoubtedly tends to make the national convention a better deliberative body than the state convention, at the same time it makes a preferential vote on the candidates much simpler and much more likely to be effective.

Also it is much more likely that there may be the basis of a public opinion, regarding the qualifications for the different candidates for the head of the ticket, than for the other less important offices, that attract less attention and draw a class of candidates much less widely known. In other words, if the short ballot prevailed in the states, and the people were asked to nominate candidates only for governor or lieutenant governor, the greatest arguments against the direct primary would disappear, for the existence of a public opinion upon that question is occasionally possible. On the other hand, some of the worst objections to the state convention would also disappear,

as a result of the simplification of the task, and the greater publicity that would attach to the proceedings.

The second difference operating in favor of the preferential primary, is the greater publicity and interest that attaches to the candidates, when there are only the candidates for one office to consider. To just the extent to which this is true, public opinion has a greater opportunity to function, and it is not compelled to function on a long list of other candidates about whom the overwhelming majority of the people are absolutely ignorant.

On the other hand, there are two differences between the state and national primaries that operate to make the former the more successful and practicable. The first difference is the wider area over which the national primary must operate. It is conceivable that the people in California may be intelligent and yet not informed upon the presidential qualifications of certain very able men from New England, Virginia, or Ohio, unless it happens that those same men have unusual publicity facilities at their control, and then it will be the publicity, and not a fair estimate of relative worth, that is likely to prevail. And yet the presidential primary implies the ability of the voters of each state to pass judgment upon the available candidates from all the states. The peculiar difficulties of this aspect of the situation will be discussed later.

The other disadvantage of the national over the state primary and the result of the one just mentioned, is the "favorite son" movement. Because the people are so uninformed regarding the relative merits of all the possible candidates, they have generally been quite willing to cast their preferential votes for some favorite son. This has been frequently done when the public knew perfectly well that the candidate for whom they voted had no chance

whatsoever. This gives to the favorite son the strategic advantage of having a group of delegates which he may perhaps "deliver" at the psychological moment, and introduces a new source of intrigue and political bargaining into the convention system. Where a state deliberately votes in favor of a favorite son with a hopeless cause, it is generally done as a mere courtesy to the local statesman, or in the desire to defer to his discretion in the selection of the candidate. In the latter case it is an indirect and bunglesome way of working out the representative principle.

With these differences, which distinguish the presidential from the state-wide primaries, in mind, we shall now consider the operation of the former, and its actual results as evidenced by its use in three presidential contests. The first great problem is to determine the relation of the primary to public opinion. Can it be said that the primaries have registered a true opinion in the choice of candidates? The ordinary argument here is that if the people can register a true opinion by popular vote in the election, why cannot they do so in the primary? The answer is rather obvious. In the election of President, there are generally only two major candidates, from whom the overwhelming majority of the people make their choice. These candidates are nominated about four months before the election. In the meantime all the resources of the party organizations are devoted to giving to the candidates the fullest possible degree of publicity, with the result that by the time the election comes, there are very few persons who have not had reasonable opportunities to form some kind of judgment or opinion. Contrast this with the situation in the pre-convention campaigns of 1920, when at the time of the convention, many of the candidates were not known outside the borders of their

own states. To suppose, in the latter case, that a nation-wide preferential vote would have reflected a true opinion as to the relative merits of the candidates would seem a violent supposition. When there are only two candidates for the nomination as in 1912, a general primary might be expected to give reasonably satisfactory results, but such situations are likely to prove very rare. For with the presidential primaries, the favorite sons have probably come to stay as part of the political setting.

The protest vote is another factor that enters into a primary election that prevents it from registering a real public opinion on the choice of candidates. If one of the candidates shows radical tendencies and seeks successfully to exploit all the various grievances of different groups against the existing conditions, he may win a plurality of the votes from heterogeneous groups, and yet such a popular verdict would represent the very antithesis of true opinion. This is the explanation given by Mr. Talcott Williams to the vote cast for Senator Johnson in the primaries of 1920. "The progressive vote is now for Johnson, but it is not a Johnson vote. It stands for discontent with the 'regular' republican policy, disappointment over the barren record of the Republican majority in the Senate and House, anger at the soldier's 'bonus' extravagance and the failure to provide for the disabled, over the foolish fruitless conduct of state affairs and the disgraceful outcome of a Republican majority at Albany. Where has the Republican party given reason for a vote for its present managers?

"The 'German' vote, the Sinn Fein, the 'anti-war' factions, these Johnson had. His vote is noble and ignoble, national, extra-national, anti-national, but its strength is the deep tide of desire and demand, swelling over all the land, for a solution of the real problems of the hour."[1]

[1] "The Republican Primaries," in *The Independent*, Vol. 102, p. 208.

Perhaps the current tendency to treat the primaries as opportunities for practical joking is worthy of passing remark, in connection with the efficiency of the primary to register real opinion. In 1920 the names of unknown persons were filed as candidates for the vice-presidency in South Dakota and Oregon, and for the presidency in Michigan. One of the unknown candidates in Oregon was "Elwood Washington." His boosters claim, with quiet humor, that he is a descendant of the Father of His Country. In 1916, a Mr. Robert G. Ross, a genial livery stable proprietor of Lexington, Nebraska, received between 15,000 and 20,000 votes for President in the Republican and Democratic primaries of that year.

Another difficulty with the primaries giving effective expression to public opinion, is found in some of the ill-considered features of the laws themselves. For instance the Oregon law provides for the popular election of delegates by congressional districts, but pledges them to vote according to the preferential vote throughout the state. The result was that in 1912 Roosevelt received the preferential vote, but the majority of the Taft delegates were elected in the districts. In 1920 Senator Johnson received the preferential endorsement, but the delegates elected were hostile to his interests. Similar difficulties have developed in other states, although these particular evils may be avoided by the adoption of primary laws that are sanely and intelligently drafted, so that the election of delegates and the preferential votes, intended to bind them, should be based upon the same political unit.

The tremendous importance attached by political managers to success in the states holding the first primaries indicates what a large part mere suggestion and publicity play in the preferential voting. No better evidence of this could be desired than the frantic efforts of politicians

to secure an initial success in the "opening" states. The moral effect of such preliminary triumphs is so great that no energy or expense is spared. *The Nation,* June 6, 1912, declared that in this struggle "all the political machinery and sinews of war are moved from one state to another, like a circus on its travels. * * * The danger is that we shall have a recurrence of the old evil of 'October States,' when Ohio and Indiana were flooded with money and overrun with politicians, while the electorate was debauched all for the sake of 'pointing the way for November.'" Four years later, on April 5, the *Outlook* described how "the flying squadrons of partisans, inspired by the atmospheric influence of the results in one state, rush on to another state to accentuate artificial sentiment there." While these statements may be exaggerated, they indicate with reasonable accuracy the important rôle played by suggestion, caprice, and accidental factors. Under such conditions it can scarcely be contended that the popular pluralities that are registered on such occasions necessarily express a real opinion.

We thus find a formidable array of evidence to the effect that preferential primaries do not register a true public opinion in the choice of presidential candidates. This means that other factors than rational processes of thought and enlightened judgments of fact tend to dominate in such a choice. What are the results of primary votes under such circumstances? What effect does it have upon the type of men selected, upon the processes of popular control, and how far does it tend to do away with the evils of the boss? These are three questions that now require our consideration.

That the primary tends to place an undue emphasis upon men who enjoy unusual publicity facilities is scarcely open to doubt. That good publicity and able statesman-

ship always go hand in hand would scarcely be contended. Mr. Henry Ford, who won the Republican primaries in Michigan in 1916 and ran a close second in Nebraska in the same year, is an excellent example of the importance played by publicity. Under the convention system he could never have captured the Republican delegations from these states, for whatever excellent things may properly be said of Mr. Ford, he is not to be taken seriously as a presidential candidate.

In the Republican convention of 1920 the two leading candidates, Major General Leonard Wood and the Governor of Illinois, Mr. Frank L. Lowden, both men of distinguished records in the public service, found it necessary to spend such large sums of money in securing delegates outside of their own states, that when the convention met, the prejudice against the use of such vast sums of money was so great that it was a very influential factor in their defeat. Though these two men had won many more delegates than the rest, they were defeated, because they used the only means possible, under a preferential primary, where the competition is keen, to prove their cause to the people and to win their popular support. Investigations by a Senate committee showed that one candidate had expended over $1,000,000 and the other over $400,000. It was not charged that the money was dishonestly or illegally expended, and there seems no reason to think that it was. Nevertheless the result seems to place a tremendous premium upon wealth, and to disqualify from office those who do not enjoy large fortunes or the support of wealthy friends. The result was that the candidates who took the primary laws in good faith carried on campaigns for popular support, sought to bring their claims to the attention of the voters of the different states, and staged a nation-wide cam-

paign of publicity (which was necessary if the people were to vote intelligently upon their respective merits), were defeated for their pains. If this obvious evil is to be removed, it will be only by prohibiting private contributions and expenditures, an almost impossible task, and providing for the legitimate expenses of the candidates out of public funds.

As a means of securing popular control over the selection of candidates, the primary is effective to just the extent that it registers a real opinion on the choice of candidates. We have already seen how infrequently that is done and the tremendous difficulties that bar the way. In the Republican campaign of 1916 there were only two candidates for the presidency for whom there seemed to be any popular demand. Neither Mr. Roosevelt nor Mr. Hughes would permit their names to go before the people in the primary states. On the other hand, there were a number of favorite sons who won the primaries in their own, and occasionally in neighboring states. Had there been at that time the kind of nation-wide preferential primary recommended by President Wilson, some favorite sons would have been nominated by a bare plurality of the vote, which could not possibly have reflected any true opinion. As it was, the candidate of the convention, Mr. Hughes, did represent a real opinion among the rank and file of his party. He was nominated through the influence of the party leaders, despite the protests of the favorite sons, because the party managers, playing true to form, wanted a candidate that they thought was sure to win. It was to their selfish and partisan interest to interpret accurately the real opinion of the public in order that they might curry popular favor. Thus the voice of public opinion, thwarted for the time being by favorite sons in the presidential primaries, finally tri-

umphed through the victory of political bosses. This does no mean necessarily that the best man was nominated, but merely that public opinion finally became articulate through the much despised power of the party leaders. The danger in such situations is that the power of the favorite sons may be so great, that by political manipulation and deals they may be able to defeat the wishes of the great leaders, who have both the perspicacity and the common sense to select a candidate whom the people want.

The effect of the primary in curbing the evils of the political boss should now receive some consideration, as this is one of the arguments most frequently relied upon in its defense. Mr. Dickey states the case as follows: "The temptation of the political party is to view organization as an end in itself. As a result the party will no longer exist as an organ for facilitating the expression of public opinion, but will become chiefly interested in offices and spoils. To the end that it may become more efficient in realizing these latter purposes, the party organization tends to become centralized and to fall under the control of a limited number of able leaders who sacrifice a great deal in principle to attain the greatest strength and highest perfection in organization. The obvious remedy is to bring the party organization as much as possible under the direct control of the party voters."[1] But the "obvious remedy" here suggested implies the practicability of "direct control of the party voters" which we have already seen presents tremendous difficulties. If direct control means a scramble among a group of favorite sons resulting in the rule of a hopeless minority through nominations by plurality; if it means a contest in which the

[1] F. W. Dickey, "The Presidential Preference Primary," in *Amer. Polit. Sci. Rev.*, Vol. IX, p. 475.

prize will go to those whose financial capacity enables them to hire the largest forces of publicity; if it means that accident, caprice, and suggestion are to play important rôles in the selection—and all these possibilities must be frankly faced in connection with the presidential primary—then it does not offer a very attractive solution to the problem.

This raises the question whether it will not be best to fall back upon the doctrine of party responsibility, developed in the preceding chapter, and allow public opinion to rule indirectly by approving or rejecting the results of the party's deliberations. No one will seriously contend that any great number, any considerable percentage of the voters, were in a position to pass an intelligent judgment upon the relative qualifications of all the different candidates for the Republican nomination in 1920. On the other hand, a vastly larger number—after the political campaign, after they had seen the alignments created by the nomination and the platforms, and after it had become obvious from what groups the cabinet would be chosen—were able to pass an intelligent judgment upon the work of the party and the convention, and to apply at the ballot box a reasonably efficient system of rewards and punishments. After all, the selection of the best candidate is a question of fact dependent upon many circumstances, a wide acquaintance of all of those competent to serve, and a clear understanding of the particular issues that are likely to be paramount. It is, therefore, necessarily one of those questions upon which real public opinion cannot function directly, but where it must function indirectly, through the theory of party responsibility, if it is to function wisely and effectively.

One of the difficulties is the popular determination to regard political bosses as a group of men, vested with

some species of occult power, and determined to throttle the public will. Nothing could be farther from the truth. Among keen political observers, the most common criticism of politicians as a class is their fear of offending the public will. The reasons are obvious. Their power comes from their ability to secure approval at the polls, for without that they are helpless. Mr. Bryce has observed how carefully American leaders search out and follow the opinion of the people. "Those who manage the affairs of the country obey to the best of their hearing. They do not, as has been heretofore the case in Europe, act on their own view, and ask the people to ratify; they take the course which they believe the people at the moment desire. Leaders do not, as sometimes still happens in England, seek to force or anticipate opinion; or if they do, they suffer for the blunder by provoking a reaction. The people must not be hurried. A statesman is not expected to move ahead of them; he must rather seem to follow, though if he has the courage to tell the people that they are wrong, and refuse to be the instrument of their errors, he will be all the more respected. Those who fail because they mistake eddies and cross-currents for the main stream of opinion, fail more often from some personal bias, or from vanity, or from hearkening to a clique of adherents, than from want of materials for observation."[1]

Another objection to the convention is that its deliberations are not controlled by the mass of the delegates, but by the mere handful of political bosses who sit behind the scenes and wield their power. But there is nothing unusual about this. There are no deliberative bodies and no instances of group action, where the leadership is not vested in a few of the ablest members of the group. The

[1] *American Commonwealth*, Vol. II, p. 280.

political bosses at a national convention cannot control the delegates, unless the delegates whom the people have chosen wish to be controlled. If the bosses dominate, it is because they have the confidence of the delegates. Their control is most frequently based upon their superior ability to see the great lines of compromise which must be followed, if the varied factions of the convention are to agree upon a common plan of action. The service that they render is of the highest value. Their power is conditioned upon the consent of the delegates. Whether it will be exercised for the good of the public will depend upon what the public will demand, for unless they appease the public their power is gone.

To take a great national convention, with all its differences of viewpoint, its factional disputes, its conflicting interests, and its clashes of ideals, and to arrange a program and select a candidate upon which the convention can agree, is a task demanding the highest statesmanship. Moreover, it is of paramount importance to American democracy. It is not necessary that one must approve in detail the accomplishment, but it is vital that there should be such an honest compromise of conflicting interests as will enable them to take group action that will be effective. Honest compromise is the very essence of democracy, and the moment when the American people cannot meet in their great national conventions and thrash out a national program upon which they can agree, but split up into irreconcilable, hostile groups—that moment we lose much of our practical capacity for self-government. Under such circumstances public opinion is impossible, and without public opinion popular government becomes a myth.

The present primary laws have made this tremendously important task more difficult of accomplishment

by introducing the flocks of favorite sons. This introduces new artificial lines of cleavage, gives unusual power into the hands of local politicians, opens the way for a new kind of political logrolling, and adds new burdens to those whose mission it is to develop a genuine consensus of opinion among the group. The laws of some of the states make no effective provision for party tests, with the unedifying spectacle of members of one party seeking to nominate impossible candidates for their competitors. Because of the tremendous power such an arrangement places in the irresponsible hands of an independent press, the proprietor of a string of newspapers and a prominent member of the Democratic party, was alleged to have controlled almost eighty votes in the Republican convention of 1920. Moreover, it is significant that the efforts of this group of papers as well as of some of the delegates involved seemed determined to split the convention at any cost.

An excellent example of the manner in which the leaders of the party may work out results in a convention, superior to those obtainable in a primary, because more representative of the entire nation, is cited by President Hadley. "In the presidential campaign of 1860, if the Republican convention had consulted the wishes of the majority of voters within the party it would have nominated Seward. He had taken strong ground against slavery; and northern Republicans who were excited by the heat of our slavery contest saw in him their natural champion. But sagacious men knew that Seward could not be elected, and convinced the convention of the soundness of that view. It nominated Lincoln—a man who spoke less of abstract principles than Seward and more of constitutional law; less of the abolition of slavery—however much he may have had this at heart—and more of the

preservation of the Union. The nomination of Lincoln was a distinct disappointment to extremists throughout the North; but it appealed to moderate men in states adjoining the Potomac and the Ohio, whose votes were necessary and sufficient to elect him.

"This instance is a typical one. The convention system has been distinctly favorable to the nomination of businesslike candidates for the principal offices—of candidates who were unsatisfactory to some of the extreme elements in their own party and satisfactory to the moderate men in the opposite party. It hastened to give us men who appealed to the country instead of appealing to a group. With the substitution of the direct primary we are bound to lose something of this advantage. We are almost certain to see a large number of candidates who represent extreme views on either side. To prevent this danger from becoming fatal the press of the country will have to recognize the responsibility that is placed in its hands by the new conditions, and strive to moderate rather than to accelerate the tides of unreasoning emotion."[1] So far we have not seen a great deal of those modifying influences in the press which were deemed essential to avoid the ill effects of the primary system.

There are many evils and abuses that will continue under either system. In the last analysis it will be the extent of public interest and intelligence that will determine how intolerable these abuses may become. Gradual improvement of the primary legislation as well as the perfection of the convention system will contribute something to the betterment of conditions under either system. Nothing remarkable will be accomplished except as there is developed among the people a keener sense of personal accountability for the public weal, a more intelligent un-

[1] A. T. Hadley, *Undercurrents in American Politics*, pp. 166-67.

derstanding of the tasks to be performed, and a deeper devotion to the basic ideals of American democracy. As these forces develop with the passing years, it does seem that some form of the convention system, with its opportunities for compromise and readjustment, for the ultimate rule of the majority rather than of the plurality, and for the utilization of the best and ablest leadership within the party, will become the most effective instrument for popular government. The convention places a premium upon leadership rather than mediocrity, upon real national opinion rather than upon local but competing sentiments, and upon the real compromise which is essential to majority rule instead of upon some irreconcilable program of a triumphant minority under a system of plurality control. Public opinion cannot function directly upon the intricate and delicate task connected with the presidential nominations, but it can leave the technical details to the leaders of the party, and function indirectly by holding them to accountability for the results achieved.

SUGGESTIVE QUESTIONS FOR

CHAPTER V

I. If President Wilson's suggestion for the nomination of a President by nation-wide, direct primary were adopted, and many states continued their policy of supporting favorite sons, what would be the effect upon majority rule?

II. In electing delegates to the national convention, which unit of election, the congressional district or the state, gives to public opinion its best opportunities to function?

III. Is there any logical relation between the candidate nominated and the platform adopted? If so, how could this relation be preserved under the preferential primary system?

IV. In states where preferential primaries have been adopted, is there any proper objection to candidates spending large sums of money so long as it is expended legitimately in bringing the qualities of the candidates to the attention of the people?

V. If there is no objection, does this mean that no candidate can be successful unless he is very rich or has wealthy friends?

VI. Compare the result of the preferential votes in the Republican primaries in 1916 and the results of the nominating convention. Which, in your opinion, most truly represented public opinion?

VII. If nominations are left to a convention, which is strongly influenced by political bosses, what reason is there to believe that public opinion will be respected?

VIII. If the people elect delegates to a national convention who can be arbitrarily controlled by others, what reason is there to believe that the people would do better in the selection of a candidate?

IX. What justification, if any, is there for allowing others than party members to vote in the party's primary?

X. What would be the effect upon the popular control of government if the delegates to a national convention could not effect a compromise upon which a majority could agree, but broke up into irreconcilable groups?

trafficking in spoils of office, whereas in the mad pursuit of partisan or private aims the people's good and the people's cause are for the most part abandoned."[1] One of the most discriminating advocates of the initiative and referendum, Professor John R. Commons, bases his argument almost entirely upon its importance as a means of preventing bribery, and he suggests the caution that too much must not be expected of it. "It is to be classed, not with legislation proper but with such devices as the secret ballot, the official primary, the corrupt practices acts. Its urgency is not as a means of bringing in reforms, but as a cure for bribery, spoils, and corruption. * * * With the referendum the use of money, whether honest or corrupt, will be almost abolished. The main objection to the referendum is that it defeats sound reforms as well as 'jobs,' because the people lack confidence in their lawmakers. In the long run it is too conservative. It will disappoint the radicals who now advocate it. The conservatives who now oppose it will be its hottest champions. The initiative will give but little help in this direction."[2]

The initiative as it has been generally adopted in the United States is a device by which a specified number of people (varying from five to eight per cent.) may frame a statute and, by petition, submit it to the voters of the state for their rejection or approval. If approved it becomes a law. The referendum, on the other hand, is merely a device by which the people may exercise a popular veto upon any measure passed by the legislature. The referendum is purely negative, while the initiative is constructive. The referendum may be optional with the

[1] "Moral Aspects of the Referendum," in *Internat. Jour. of Ethics*, Vol. XIII, pp. 133-151.

[2] "Direct Legislation in Switzerland and America," in *Arena*, Vol. XXII, pp. 725-39.

to the government they had neglected. In attributing the blame for all of this to the weakness of governmental forms and the abuses of the political boss, they unconsciously sought moral "alibis" for their own indifference and neglect. Government, politics, business—all were subjected to zealous scrutiny and vigorous abuse. Out of this moral and civic awakening there developed many political tendencies and among them were the two tendencies in legislation above mentioned.

When the public discovered the extent of legislative incompetence and corruption that had resulted from popular indifference, it was but human nature for them to seek a veto upon legislative power and the creation of an alternative device. In a democratic country there seemed to many but one place for them to turn, and that was to the people. The demand for the initiative and referendum was the inevitable result. The obvious fact that it was the indifference of these same people that made possible the conditions they sought to remedy had little influence where the spirit of optimistic democracy was so strongly intrenched. The following characterization of the evils of representative government, by Mr. Langdon C. Stewardson, is typical of the point of view that found expression in the popular clamor for direct legislation. "The evils of the representative system are therefore great and grievous. Manifold also are the temptations to which the representative by virtue of his position is exposed. Unlawful usurpation of power individually or in committee, the illegal exertion of administrative pressure for personal or party ends and the demoralizing opportunity to obtain the prize of illegitimate riches, have all combined to impair or debauch the character of many representatives. Great political principles are forgotten or repudiated in the busy game of

trafficking in spoils of office, whereas in the mad pursuit of partisan or private aims the people's good and the people's cause are for the most part abandoned."[1] One of the most discriminating advocates of the initiative and referendum, Professor John R. Commons, bases his argument almost entirely upon its importance as a means of preventing bribery, and he suggests the caution that too much must not be expected of it. "It is to be classed, not with legislation proper but with such devices as the secret ballot, the official primary, the corrupt practices acts. Its urgency is not as a means of bringing in reforms, but as a cure for bribery, spoils, and corruption. * * * With the referendum the use of money, whether honest or corrupt, will be almost abolished. The main objection to the referendum is that it defeats sound reforms as well as 'jobs,' because the people lack confidence in their lawmakers. In the long run it is too conservative. It will disappoint the radicals who now advocate it. The conservatives who now oppose it will be its hottest champions. The initiative will give but little help in this direction."[2]

The initiative as it has been generally adopted in the United States is a device by which a specified number of people (varying from five to eight per cent.) may frame a statute and, by petition, submit it to the voters of the state for their rejection or approval. If approved it becomes a law. The referendum, on the other hand, is merely a device by which the people may exercise a popular veto upon any measure passed by the legislature. The referendum is purely negative, while the initiative is constructive. The referendum may be optional with the

[1] "Moral Aspects of the Referendum," in *Internat. Jour. of Ethics*, Vol. XIII, pp. 133-151.

[2] "Direct Legislation in Switzerland and America," in *Arena*, Vol. XXII, pp. 725-39.

people, being invoked only in case a certain per cent. of the people petition for it, or it may be optional with the legislature, the reference to the people being left to their discretion, or it may be compulsory, the constitution providing that every law or every law of certain classes shall not become effective until approved by the people in a referendum vote. Constitutional amendments in all our states are now subject to the compulsory referendum.

It will thus be seen that the initiative and referendum, in so far as they tend to supplant or veto legislative action, to that extent directly raise the question of direct democracy as against representative government in legislation. This in turn depends upon whether public opinion can function the most effectively in the difficult task of meeting modern legislative needs, through the direct forms provided by the initiative and referendum, or indirectly through our representative system of legislatures. This involves a careful analysis of the needs of modern legislation in the light of the inherent limitations in the nature and operation of public opinion.

A survey of the legislative field will disclose at least three definite needs of modern legislation. The value of the initiative and referendum will depend upon their efficiency in the meeting of these needs. The first obvious need is the accurate and honest formulation of public policy. This may be a relatively simple question such as whether or not the liquor traffic shall be prohibited, a certain specific debt limit exceeded, or a bonus granted to the returning soldiers. Such legislative policies involve general principles or common facts reasonably well known to all. It may safely be assumed, therefore, that in such cases a public opinion may and does exist, and that a referendum vote on such simple matters would truly reflect the opinion of those participating in the election.

Moreover it seems equally clear that a voluntary group would have no difficulty in initiating such a policy in such a way as to secure an intelligent response. In case a legislature, for one reason or another, should fail to follow public opinion or decline to take any action, the initiative and referendum would provide the public with a direct method of relief.

But there are very few legislative problems that are so simple that a public opinion regarding them may be said to exist. A very excellent illustration of the technical and complicated problems involved in the formulation of an ordinary public policy is given by Mr. Thomas I. Parkinson. "In workmen's compensation legislation, for example, the legislator, if he performs his legislative duty seriously, must first study the existing employers' liability law, and the evils, if any, produced by its operation. He must analyze these evils and consider the possible methods of remedying them, and for the purpose he ought to know and appreciate the methods by which in other states or countries similar evils have been remedied. Having decided that the compensation system offers the best means of doing justice, there remain for his decision important questions of policy involved in working out the details of such a scheme. For example, shall the scheme apply in all employments, in all with certain exceptions, or in certain specified employments selected because of their extra hazard or otherwise? Are all injuries in the course of employment to be compensated, or are certain injuries, such as those caused by an employe's own deliberate act, to be excepted? Upon what basis shall the compensation be computed and how shall the computation be made and under what conditions shall it be paid? What shall be the procedure to determine controverted questions? What, if any, administrative organization is re-

quired for the proper enforcement of the scheme? Every one of these problems involves the determination of a multitude of detailed questions of policy before the precise limits of the rights and liabilities created by the act are defined in such manner that employer, employe, administrative officer and the court may know when and to what extent the legislature intended that A, an employer, should compensate B, his employe, in case the latter is injured in the course of his employment."[1]

No one would seriously contend that upon such a policy or law a public opinion is conceivable. For the average layman to read a statute embodying such a policy in the technical language of the law would but confuse and bewilder him. It is true that he may have an opinion in favor of more liberal legislation regarding workmen's compensation, but as to whether a particular statute faithfully embodied the policy he desired, so that it would give the results he sought, or whether it was full of jokers, or whether it was a dishonest evasion of the policy demanded by the public, under the smoke screen of legal verbiage, he could not possibly determine. He might be willing to accept the word of some newspaper or politician or public man, but if he be driven to that extremity, would it not be better to have him leave it to his official representatives, whom he has helped to elect, and who are morally and politically responsible for the results of their legislative acts. If they have been negligent or played the public false, the people may have just retribution by retiring them, and the party they represent, to private life. In dealing with such technical questions—and most modern legislative problems come within this class—public opinion cannot function directly. As indicated in a previ-

[1] "Legislative Drafting," in *Proceedings of the Academy of Political Science*, 1913, pp. 144-145.

ous chapter, it must function indirectly through the choice of representatives, and checking them up by holding them and their party to strict accountability for the results of the policies they adopt. The people are not able to judge of a workman's compensation act by a mere reading of the statute, but after it had been in operation for a period of time, and its results become known, then it is for the first time that public opinion may become articulate.

To submit such measures, upon which a public opinion is not possible, to a referendum vote is to submit the fate of legislation, which may be of tremendous importance to the best interests of the state, to the determination of caprice and chance. For a popular vote amounts to nothing more where a public opinion is not involved. Wisconsin has a law providing a tubercular test for cattle which is very effective. The author has been informed by those in close touch with the administration of the law, that had there been a referendum provision in Wisconsin, at the time the statute was adopted, it would have been submitted to the people and would have been defeated. This would have been due to the fact that the general public would have been indifferent to it, because they did not understand its provisions or importance, while the farmers would have fought it because at first it seems to them to be an unwarranted invasion of their private rights. But after several years of successful operation, and the enjoyment of the results achieved, it would be supported by all alike.

The Wisconsin income tax affords a like example. As previously noted, about the time the people of the state were engaged in the perplexing task of making out their first returns, a referendum vote upon the provisions of the law would have been hailed with shouts of vindictive delight and the law would have been destroyed. To-day

there would be no danger of its defeat. Very little legislation that is really progressive does not encounter a temporary opposition born of the friction resulting from the necessary change, or determined opposition from a special group whose selfish interests have been involved. To submit the law to popular determination before the public have had ample opportunity to judge of the actual results, is to give undue influence to special interests and popular fancy as against the mature, deliberate judgment of public opinion.

Nor are these the only dangers that scientific legislation must encounter in running the gauntlet of direct democracy. Most of the people are conservative. The result is that when they do not understand a law, they either decline to vote at all, thus leaving it to those who may have a special interest in the result, or they adopt the slogan of "safety first" and vote "no." The result is that much good legislation may be killed, not because the people do not approve, not because they are opposed to it, but because they do not understand. As our political and social life becomes more complex, legislation will necessarily become more difficult to understand, with the result that this objection to the referendum will become one of increasing importance. President Lowell has made a most thorough and scholarly investigation of the operation of the referendum in Switzerland, coming to the conclusion that the results were neither radical nor socialistic, but on the other hand, that they were conservative.[1] The same writer made a careful analysis of the twenty-three general state laws that had been defeated by referendum votes in the United States up to and including 1912, and reached the conclusion that in the cases of sixteen of the laws, or almost three-fourths, a public opinion

[1] *Public Opinion and Popular Government*, p. 168.

was impossible by the very nature of the case.[1] In other words, in three-fourths of the cases where the people have applied a popular veto to the deliberate actions of the state legislature, the action has been dictated by ignorance, accident, or caprice, rather than by public opinion or other rational procedure. In view of these considerations there seems no escape from the conclusion that the popular referendum not only fails to make any real contribution to the task of the accurate formulation of public policy, in those cases where the policy involves technical and complex matters, but that it tends to give undue preference to temporary fancy and special interest, rather than to deliberate judgment and real opinion, and finally that it results in the veto of legislation by ignorance and the absence of opinion rather than by the intelligent judgment of the electorate.

To this latter objection it has been answered that one of the good effects of the initiative and referendum is that they will be expressed in language so clear and simple that they can be readily understood by the citizen of average intelligence. This sounds pleasingly plausible but will not stand investigation. One cannot comprehend a workmen's compensation statute unless one is familiar with the existing status of the law. One cannot intelligently judge of the wisdom of a statute against industrial disease unless one knows the nature of the various diseases involved, the proper preventive measures that science has discovered, the mechanical and manufacturing aspects of the industries that are involved. It is not too much to say that statutes dealing with such problems can never be brought to the alluring simplicity suggested. The whole argument proceeds upon the wrong hypothesis. It puts the cart before the horse. It seeks to cramp and compress

[1] *Ibid.*, pp. 174-184.

the problems of life within the forms provided by preconceived notions of democracy. But our problem is not so simple. We cannot cut down our problems to fit a primitive conception of democracy. We must adjust our conceptions of democracy to meet effectively the actual, vital problems of the age. If these problems require technical knowledge and specialized skill, then we must discover some method by which public opinion can apply and utilize these qualities in the performance of its tasks. Clearly this cannot be done by the devices of direct democracy.

At the time America was considering the vital question of peace or war with Germany, a demand was made that war should not be declared without a referendum vote. It was urged that it was an awful responsibility for the constitutional officers of the government to lead the people of a great nation into the most terrible war of history. No one will deny the awful nature of the responsibility involved. But this does not necessarily constitute an argument for the referendum. It merely emphasizes the importance of having that authority located where it will be the most effectively and intelligently exercised. Now let us consider the wisdom of the suggestion. A great many people felt that the war was the result of conditions for which America was the least responsible of any of the nations of the world. They felt that if we could avoid the present war without mortgaging our future, such a course was the part of wisdom. But this depended upon two vital questions of fact. If we did not intervene, would Germany win? And if Germany won, would a German victory prejudice the future interests of the United States? Obviously the people who took this point of view could not have an opinion, or come to an intelligent determination upon the question of peace or war, until they

had first come to a conclusion on the two questions of fact suggested.

As to the possibilities of a German victory if we did not enter, that would depend upon great and complex questions of military strategy, the size of the competing armies, the relative sources of food supplies, the morale of the military forces and peoples of the belligerent states, the industrial and financial resources of the countries involved, and finally upon the diplomatic sympathies and tendencies of the neutral countries of the world. The government at Washington, with its secret service, its diplomatic channels, its confidential information from the belligerent countires, its expert advice upon the various technical aspects of the situation, would be in a position to pass an intelligent judgment from month to month upon the probable outcome of the struggle, whereas the overwhelming mass of the people would never be in possession of sufficient data even to hazard an intelligent guess. The evidence now appears to be very clear, that had we waited until the people could have come to an independent judgment, it would have been too late, and Germany would have won.

Nor would our people have been in any better position to have judged as to whether or not a German victory would mortgage the future of America. That would depend upon the facts and conditions underlying European diplomacy, upon the bewildering complexities of world politics, and upon the real purpose and intent of German foreign policy and the German people. With our proverbial ignorance of foreign affairs and European diplomacy, the American people were not able to come to an intelligent opinion upon this fundamental problem with sufficient dispatch and promptness to protect their future interests. A referendum on the issue of peace or

war, under these conditions, would have meant but little, except to have caused a fatal delay in the protection of American interests. The American people, recognizing the need of action, were ready to follow the decision of their constitutional authorities, and to support them with a unanimity of action and a determination of purpose that has reflected undying glory upon their political sagacity, their patriotism, and their common sense.

So far we have been considering the referendum from the standpoint of helping in the determination of accurate public policy. Many will admit the futility of the referendum in this respect, but will find a justification for it in its effectiveness in securing honest, if not accurate results. They argue that since the adoption of the initiative and referendum, legislative corruption has practically disappeared, and at once they arrive at the interesting conclusion that it was all due to the beneficent effects of direct legislation. That it has disappeared very largely is admitted, but that the cause has been the adoption of the initiative and referendum has never been established. It is argued with great enthusiasm that in Oregon dishonesty is rarely if ever found. But the same is equally true of Wisconsin, and with equal logic it can be claimed that Wisconsin's refusal to adopt the referendum has been the cause of her legislative rectitude. The facts would seem to be that the general improvement in legislative honesty and decency has been due to the moral awakening of the last two decades and the civic renaissance that accompanied it. Certainly there is no reason to suppose that in modern technical legislation, upon which public opinion is impossible, a popular vote would be any more effective in detecting dishonest motive than in discovering inaccurate policy. The moral tone of the legislatures has improved because of the growing

interest of the people. Increased civic interest and intelligence will always find expression in more honest and efficient government. Our problem here is to find what forms of government constitute the most efficient instruments for the expression of this growing interest.

So far we have considered only the referendum with reference to the formulation of public policy. The initiative as a means of formulating public policy now remains to be considered. This is extremely important, for as the initiative and referendum operate in most states, any measure that is backed by the proper petition must be submitted to referendum vote, and if adopted will become the law, regardless of how poorly and inaccurately the policy has been formulated. As already observed in the case of technical legislation, it is impossible to have a public opinion function upon this tremendously important matter. The result is that laws that have been privately drawn, without the sifting and hammering process through which bills go in legislative committee and public hearings, and for the formulation of which no person is officially responsible, may become laws merely because they purport to deal with things which the public favors, but without public opinion being able to judge as to how accurately and honestly the proposed policy has been embodied in the bill.

Most of us take too lightly the tasks of modern legislation. The popular inclination is to find some evil practice and to pass a law prohibiting it. In the complexities of modern life, when there are so many interests to be defined, delimited, and protected, and the number of legal rules increases proportionately, the wise and intelligent formulation of public policy, in such a way that it will be the most beneficently expressed, and provide the minimum of friction with legitimate interests, is a

task requiring the most comprehensive legal and social scholarship. Dean Pound has given a succinct statement of the considerations that are involved. "What the lawmaker has to consider, therefore, is (1) the interests which the law may be called upon to recognize and secure, (2) the principles upon which such interests should be defined and limited for purposes of legal recognition, or, to put it in another way, the principles by which conflicting interests should be weighed or balanced in order to determine which are to be recognized and to what extent, (3) the means by which the law may secure the interests which it recognizes, and (4) the limitations upon effective legal action which may preclude a complete recognition or complete securing of all these interests to the full extent which ethical considerations may demand."[1] A casual consideration of the foregoing statement will convince one that the wise formulation of public policy is only possible among those of great training and scholarly attainments.

The greatest students of American legislation are in substantial agreement that one of the chief needs in our legislative development is a sense of principle. Underlying all legislative effort there should be great fundamental principles in accordance with which legal development takes place. But these principles can be discovered and applied only by those who are special students of the subject. To formulate intelligently a policy of taxation according to incomes, in such a way as to conform to sound fundamental principles, involves a comprehensive knowledge of the whole field of public finance, a clear understanding of the system of finance already in force and the manner in which the new system will affect

[1] "Legislation as a Social Science," in *Amer. Jour. of Sociology*, May, 1913, p. 763.

the old, an adequate mastery of the problems of public administration and of the constitutional limitations that are involved, and finally a comparative knowledge of how these same matters have developed in other states and nations. The Wisconsin income tax law was the joint product of a group of scholars who gave two years to the drafting of the law, with the result that it has proved to be a very valuable piece of legislation, because in the main it embodied sound fundamental principles.

Professor Freund has given a very excellent statement of what he means by principle in legislation which will help us to understand the technical nature of the task imposed upon those who undertake the formulation of statutes. "Principle as applied to legislation, in the jurisprudential sense of the term, thus does not form a sharp contrast to either constitutional requirement or policy, for it may be found in both; but it rises above both as being an ideal attribute demanded by the claim of statute law to be respected as a rational ordering of human affairs; it may be a proposition of logic, of justice, or of compelling expediency; in any event it is something that in the long run will tend to enforce itself by reason of its inherent fitness, or, if ignored, will produce irritation, disturbance, and failure of policy. It cannot, in other words, be violated with impunity, which does not mean that it cannot be or never is violated in fact."[1]

It would seem that little more need be added to prove the complicated nature and the fundamental importance of the intelligent framing of legislation. In the face of such considerations it becomes obvious that the initiative is not only likely to prove futile, as a means of accurately drafting legislation, but that it may at times prove actually mischievous by submitting to the hazards of pop-

[1]Freund, *Standards of American Legislation*, p. 218.

ular approval, the legislative projects of irresponsible parties. Nothing is more disastrous to the civic interest of the people and to popular confidence in government than to work hard for the passage of a law which gives promise of relief from some pressing need, only to have it fail because poorly drawn, improperly conceived, inadequate in scope, or impossible to enforce. It may be answered that private parties, reform associations, and others may employ the services of experts and thus secure the submission of ably drafted statutes. Undoubtedly this is true, but this will not afford any reliable assurance that it will be frequently done and provides absolutely no guarantee against the submission of poorly drawn statutes by the uninformed whenever they may desire.

On the other hand it is the legislature that makes possible the utilization of technical knowledge and expert advice. Moreover it gives opportunities for debate, criticism, compromise, and adjustment during the process of construction which is not permitted by the initiative as generally employed. Mr. S. Gale Lowrie has given us an excellent statement of this particular advantage that the legislature enjoys. "From the introduction of a bill in our American legislatures to its final passage, it undergoes many processes calculated to reveal its weaknesses; if these are fundamental, the measure must fail, if but incidental, it may be amended in such a manner as to make it a workable statute. Considerable progress has been made in recent years toward the betterment of processes for statutory construction. The growth of the legislative library movement, the installment of drafting departments, the revision of rules relative to committee hearings so as to further guarantee adequate consideration of measures and a proper report upon them, already

give promise of a new era in representative government. The committee hearing is invaluable. Through this process representation of the various interests and the many social groupings in the state is approximately reached. Those more directly affected by proposed laws may thus present arguments for or against their adoption and valuable information relating to the practicality and usefulness of contemplated legislation is thus made available. To this is added the debates on the floor of the legislature to which the proposed laws are further subjected. This process is not open to laws passed under the Oregon initiative. No step intervenes between the drafting of a measure and its final consideration. Once filed, a measure is subject to alteration by neither its friends nor enemies but must be voted upon by the people who settle its fate upon a direct 'yes' or 'no' vote. Little patience would be had with the suggestion that legislative procedure be limited to a vote upon measures, that no bills be referred to committees or debated upon the floor of the house, but that with the furnishing of members the text of measures and a review of such arguments as might appear in the public press, legislative consideration should end. If such a procedure would bring results satisfactory even to the legislature, hope might be entertained for the permanency of the Oregon system."[1]

To meet this obvious disadvantage of the initiative, Mr. Lowrie suggests the adoption of the plan formulated by the legislature of Wisconsin. "This plan establishes the initiative as an adjunct of the legislature. Just as under the referendum, any law passed by the legislature may be brought before the people upon petition, so under this initiative method, any measure which has been intro-

[1] "New Forms of the Initiative and Referendum," in *Am. Pol. Sci. Rev.*, Feb., 1911, pp. 568-569.

duced in the legislature and failed of passage may be enacted by a vote of the people. Instead of circulating petitions to secure the consideration of measures, it is necessary but to find a representative who will introduce a bill in the legislature. This bill will be referred to an appropriate committee and opportunity will be given its friends and enemies to argue its merits and defects. It will be subject to amendment as any other measure and to debate and criticism in accordance with legislative rules. Should it be passed in a form satisfactory to those interested, no further action is necessary, but in the event of its defeat or its amendment in such a way as to deprive it of its usefulness, a petition of electors will place the measure, with any amendments desired by the petitioners, before the people."[1] This excellent suggestion, which, however, never became law, would certainly obviate some of the vital objections to the initiative.

The second great need of modern legislation is scientific bill drafting. Not only must the public policies be accurately and honestly formulated, but they must be translated into "apt and precise language which will fit them into existing principles of constitutional and statute law, and make them reasonably clear to the executive and judicial officers who are to enforce them." In actual practice it is practically impossible to separate these two vital needs. Innumerable incidents may be cited of needless and expensive litigation, of statutes held unconstitutional and void, of laws that were unenforcable because uncertain, and of important legislative projects that were wrecked because of incompetent and negligent legislative draughtsmanship. A technical use of terms and phrases, guaranteeing exactness of meaning and certainty and uniformity of usage, is as indispensable to an effective sys-

[1] *Ibid.*, pp. 570-571.

tem of law as it is to the science of chemistry or mathematics. Yet it is no unusual thing to find statutes drawn without regard to the technical use or meaning of the words employed, with the result that they frequently involve endless litigation, or are impossible of intelligent enforcement.

It requires no detailed discussion to demonstrate the impossibility of a public opinion upon matters so highly technical in their nature. As a means of exercising a veto upon legislation because of imperfect draughtsmanship, the referendum cannot possibly serve any useful purpose, since a public opinion on this aspect of the question could not possibly exist. Likewise the utilization of the initiative for this purpose would seem equally futile. Scientific bill drafting can be secured only where there can be close, intimate, and continuous relations between those who formulate the policy and those who translate it into legal language. In our state legislatures that have equipped themselves with legislative reference libraries and scientific bill drafting departments, legislation is the joint product of a process of debate, compromise, criticism, and adjustment of conflicting points of view, in which the constitutional lawyer, the social scientist, the specialist, the bill drafter, and the legislator have contributed their important parts. To substitute for this scientific method the easy-going simplicity of the initiative is a step backward rather than forward in the cause of legislative efficiency.

The third great need of modern legislation is that it should conform to public opinion. Legislation upon which the public are indifferent, or to which they are opposed, will be quite difficult if not impossible of enforcement. For reasons that are obvious, it is generally much better not to have a law at all than to have one con-

sistently ignored. It is especially important that statutes should conform to public opinion in that class of cases that vitally affect the private interests of any group or class. That those injuriously affected will oppose the law with all their might is obvious, and the will of the minority will prevail in defeating the enforcement of the law, unless they encounter on the other hand a public opinion that will resist their efforts. Liquor prohibition legislation is an excellent case in point. There are innumerable examples of such legislation being adopted before public opinion was ready to demand the enforcement of the law, with the disastrous results of graft and lawlessness that always follow in such cases. That there should be a real and vital relation between legislation and public opinion will scarcely be denied.

But the difficulty here is that most modern legislation implies technical knowledge and experience. Upon such matters public opinion cannot function directly for reasons that we have discussed above. It follows, therefore, that in such cases a referendum vote could not reflect the true opinion of the public. The only other alternatives would seem to be for the public to rely upon the members of the legislature, whom they have elected and whom they can hold responsible, to see that public opinion shall be respected in the legislative program. The public can judge intelligently and directly in such cases only by waiting to watch the actual results that are achieved. If the public will scrutinize the legislative members and their record with reasonable diligence, and consistently hold them to strict accountability for their acts, there is little reason to believe that they would have great occasion to complain. The cases where the legislatures have flaunted public opinion have generally been cases where the public indifference was great, and

where any system of popular government was, therefore, doomed to temporary failure in advance.

Moreover it may be argued with great force that public opinion operates the most effectively when it judges persons instead of principles. This position is further strengthened by the statistics that show a much larger vote for members of the legislature than for pending measures.

Where the laws involve only simple issues such as prohibition, exceeding debt limits, or voting bond issues, the initiative and referendum may perform a useful service in subjecting them to the test of public opinion. If there are two or three issues pending at a given time, the referendum gives the public an opportunity to approve or reject each measure as it may desire, whereas in voting only for representatives, a specific choice on each of several issues would not be possible. But even in such measures, the actual operation of the referendum shows it not to be as effective as it might seem at first thought. One of the reasons for this is the small vote sometimes cast and the close decision that occasionally follows. For example in Oregon in 1912, 38.75 per cent. of the people voted in favor of the income tax, 38.92 per cent. of them voted against it, and 22 per cent. did not vote at all. In the vote on a civil service law in Colorado, 14.61 per cent. voted for, 13.42 per cent. voted against, and 72 per cent. never voted on the measure. Obviously such decisions can have no great significance. Again a study of popular votes, even on general principles, shows an instability in result that is ample evidence that the decision did not represent real opinion but rather a passing fancy. For instance, the woman's suffrage amendment was defeated in Oregon with increasing majorities in 1906, 1908, and 1910, and then adopted in 1912.

This impression is further confirmed when one notices the number of matters coming before the people of Oregon for their decision. There were thirty-two measures in 1910 and thirty-seven in 1912, and it is assuming a great deal to expect a public opinion on so many measures. To help educate the voters, the state wisely provided for the printing and circulation of a pamphlet, with arguments pro and con on the measures coming before the people. In 1912 the pamphlet had over 250 pages of fine print, but arguments on both sides of the issue were found in the case of only thirteen of the thirty-seven laws proposed.

Experience in Oregon has not been free from what is known as sugar-coated legislation; that is, putting into a law some provisions obviously popular, with the hope that it will carry through a statute that could not stand on its own merits. For example in 1910, the amendment to the constitution repealing the provision for equality of taxation, and giving to local bodies the authority to regulate the taxes, contained a provision repealing the poll tax. The vote in favor of its adoption was 36.7 per cent. of the people, 35 per cent. voting against it and 28.3 per cent. not voting at all. At the next election the repeal of the amendment, save the abolition of the poll tax, was proposed and it was carried by a majority of over 16,000 votes.

From the foregoing it would seem that an analysis of the initiative and referendum, in the light of the great legislative needs of to-day, shows them to be not only incapable of making any real or substantial contribution to the meeting of these great needs, but that they may very seriously impair the character of modern legislation. In the few cases where laws present simple issues, they may be usefully employed, but in the great struggle with the

complex problems of the present day, the conditions demand the correlation of all the fields of specialized knowledge in any constructive and scientific attempt to develop a system of law that is adequate and just. This can only be accomplished through the process of investigation, specialization, compromise, and adjustment, for which a modern representative assembly alone is fit. It will be answered that in the direct legislation states, great progress has been made in recent years in the development of progressive laws. But it may be answered that even greater development, and certainly more gigantic strides in the perfection of scientific legislation, have taken place in some states where the referendum and initiative have never been employed. Moreover, it may be urged with reason that the employment of direct legislation tends to make the electorate more careless in the selection of their representatives, knowing that they will have a second chance to save themselves from the results of their ignorance or neglect. It is human nature for one to be careless in the exercise of a first choice when he knows he has a second choice in case of a mistake. It thus tends to undermine the strength of the legislature, which must be the hope of our democracy, if we are to develop a scientific system of law that will keep pace with the vital demands of a strenuous and complex age. As one contemplates the profound character of the many problems that demand legal solution; the demand for some adjustment of the rules of collective bargaining; the demand for adequate protection of the youth of the land in health and morals; the demand for an efficient and democratic system of industrial education; the demand for the better protection of workers from the ravages of industrial disease and accidents; the demand for a liberal system of

taxation that is just and equitable—one is compelled to recognize the hopeless futility of direct legislation, and the imperative need of profound, scientific, and constructive methods of approach. For it is in the scientific perfection of legislative methods and the representative system that we must seek the instrumentalities of progress.

Nor can one escape the sound sense expressed in the following words of Mr. Emmett O'Neal: "Members of the legislatures of the different states are the agents and direct representatives of the people, and if it be true that as a whole they are incompetent, unworthy and corrupt it would follow necessarily that the masses of the people from whom they spring and from whom they are selected were also either corrupt or criminally indifferent to their interests or liberties. They possess the same characteristics as the people from whom they have come, and if, after repeated trials and selections, the community cannot secure an intelligent and honest man to represent it, I would not like to live under laws initiated or adopted by the sovereignty of that people."[1]

[1] E. M. Phelps, *Selected Articles on the Initiative and Referendum*, pp. 206-7.

SUGGESTIVE QUESTIONS FOR

CHAPTER VI

I. The Paris Peace Conference ruled that all its sessions should be secret, and only the things agreed upon announced to the public. Is that in conflict with sound theories of popular government? Could public opinion apply to the details of negotiation?

II. Are there any kinds of problems that the initiative and referendum could not solve as well as a representative legislature? What are they?

III. We have city charters providing that franchises shall not be granted except upon the approval of the citizens by a referendum vote. Does the question of granting a franchise afford a good opportunity for the working of a referendum?

IV. Would a referendum on a no license law be an intelligent use of the referendum?

V. Who could most easily utilize the initiative and referendum, the special interests in politics or the general public? It has been urged that the initiative and referendum are the instruments by which the general public may defeat the influence of special interests. Is this sound?

VI. Modern complicated industrial and social conditions require scientific legislation. Will the adoption of the initiative and referendum encourage or discourage scientific improvement in legislation?

VII. Is the initiative and referendum to be considered a constructive or a negative instrument for improving our government?

VIII. Would the initiative and referendum be an effective instrument for the enactment of an effective income tax law?

IX. What effect, if any, do the initiative and referendum have upon the quality and character of men elected to the legislature?

X. It has been suggested that referendum laws be excepted from all constitutional restraints. Discuss.

CHAPTER VII

CONSTITUTIONAL RESTRAINTS AND JUDICIAL REVIEW

THE mere fact that people live under a popular government does not guarantee them against the abuse of power. With the enjoyment of authority, whether vested in a ruling house, a representative legislature, or a popular majority, there always goes the tendency to usurpation. Individual liberty has always had to struggle against the encroachment of governmental authority. Officialdom, whether dominated by the tyrannical purposes of a despot, or the hasty and intemperate action of the electorate, or left to its own devices by an indifferent democracy, is a constant potential menace to the cause of freedom. It is the vivid consciousness of this danger that has led radical thinkers to the extremes of philosophical anarchy and the alluring but impracticable vagaries of pluralism. They reason accurately when they declare that in actual practice the real sovereignty at any one moment is in the hands of those vested with official power.

One of the chief aims of democracy was to secure a government that would respect the fundamental rights of liberty, justice, and property which were conceived to be essential to the existence of a successful state. But the mere process of popular election does not guarantee against official ignorance or oppression. Popularly elected officials have been guilty of every kind of misconduct which may be charged to any officers. Moreover these evils were foreseen by the founders of our democracy. To prevent them, various constitutional restraints upon offi-

cial action were prescribed. The theory of the separation of powers was adopted to make the usurpation of authority more difficult of accomplishment. "One of the fundamental ideas of our government," in the words of Mr. Elihu Root, "is that all of the officers to whom the people, whether of the nation or of the state, intrust the powers of government shall be subject to certain definite prescribed limitations upon their power. These limitations are of two kinds. First, those which relate to the distribution of powers. The national government and the respective state governments are each to keep within its own prescribed field of action. The legislative, executive, and judicial officers are to be confined to their own departments of government. Within those departments particular officers, wherever it is found expedient, have specific lines of limitation upon their power. If an officer undertakes to do something which is not within the prescribed limits of his authority, his action is void and without legal effect. No matter how able and patriotic a president or a governor may be, no matter how wise a Congress or a legislature may be, no matter how much they may deem it to be for the public good that they should invade the field of action of another department, they are denied the right to do it, not because it might not be a very good thing in the particular case, but because the prevention of unlimited power is of such vast importance to liberty that no particular case can possibly be important enough to justify abandoning the maintenance and the observance of the general rule of prescribed limitations."[1]

The abuse or neglect of official power is one of the reasons frequently urged for supplementing our ma-

[1] "Judicial Decisions and the Public Feeling" in *N. Y. Bar Assoc. Proceedings*, 1912, p. 148.

chinery of representative government with the instruments of direct democracy. The more extreme advocates of this movement urge it, among other things, as a guarantee against official invasion of individual liberty and private right. Their argument implies that the rule of the numerical majority will necessarily conform with the true standards of justice and liberty. Consequently with the same movement there has gone a protest against the whole theory of constitutional safeguards. People seem to have forgotten that there is such a thing as the tyranny of the majority. They seem to have forgotten the considerations of wisdom and experience that led the framers of our government to evolve a system of constitutional self-restraint.

These reasons are briefly summarized in the words of Mr. Root. "Our fathers had experienced some and observed many invasions of individual liberty and individual right of which governments had been guilty. They realized that the nature of men is not greatly changed by a change in the form of government, and that the possession of overwhelming power affords a constant temptation to override the rights of the weak. Accordingly, both in the nation and in the state, they prescribed certain general rules which prohibited all officers to whom they intrusted the powers of government from doing certain things, such as inflicting cruel and unusual punishments, abridging freedom of speech or of the press, prohibiting the free exercise of religion, putting any person twice in jeopardy for the same offense, compelling any one to be a witness against himself in a criminal case, taking private property for public use without just compensation, depriving any one of life, liberty, or property without due process of law. It frequently happens that inconvenience results from the appli-

cation of these rules. Criminals escape because they cannot be tried twice or cannot be compelled to testify; public improvements are hindered because property cannot be taken except by due process of law; the liberty of the press and of speech often degenerates into license, and many poor people are misled to their harm by the doctrine of strange and irrational religious sects. Nevertheless the maintenance of these rules is the bulwark which protects the weak individual citizen in the possession of those rights which constitute liberty; and it is because these rules with all their inconveniences, if maintained at all, must be always maintained, that the public officer who oversteps them, with however good intentions and for whatever benefit to the public, becomes a trespasser without authority and without protection of the law."[1]

According to Lord Bryce, "A majority is tyrannical when it decides without hearing the minority, when it suppresses fair and temperate criticism on its own acts, when it insists on restraining men in matters where restraint is not required by the common interest, when it forces men to contribute money to objects which they disapprove, and which the common interest does not demand, when it subjects to social penalties persons who disagree from it in matters not vital to the common welfare. The element of tyranny lies in the wantonness of the act, a wantonness springing from the insolence which sense of overwhelming power breeds, or in the fact that it is a misuse for one purpose of authority granted for another. It consists not in the form of the act, which may be perfectly legal, but in the spirit and temper it reveals, and in the sense of injustice and oppression which it evokes in the minority."[2]

[1] *Ibid.*, pp. 185-6.

[2] *American Commonwealth*, Vol. II, p. 335.

That the possibilities of majority tyranny are not merely speculative creations, but real and present dangers, will become evident upon a moment's inquiry. During the recent war, when popular indignation and passion were at fever heat, there was a continual tendency, in many quarters, to deny to certain persons who opposed American participation in the struggle their freedom of speech. Laws were introduced in legislative bodies and administrative rulings made which, had they been enforced, would have been a dangerous denial of one of the most fundamental rights that the citizens of a free country can ever hope to claim. The author has no sympathy with those who used their constitutional prerogative to weaken indirectly the efficacy of the American forces in the war. He cannot comprehend the pride and bigotry of opinion that would sustain one in his opposition to the overwhelming conviction of the American people, backed as it was by a spirit of sacrifice and consecration, when its only result could be to prolong the struggle and increase the toll of human life. This protest against the violation of free speech is not motivated by sympathy for those who would have vitiated the results of American sacrifice exacted in the mighty struggle. It is the product of a profound concern lest freedom of speech, one of the landmarks of the struggle for liberty, should have been weakened and forgotten in the loss of perspective occasioned by the stress and strain of war. Had the conflict continued for another year, there seems little doubt that official power, backed by an overwhelming public opinion, would have been tempted to even greater inroads upon this fundamental right. Nothing but the presence of constitutional restraints, interpreted by a judiciary far removed from the pressure of popular passion, could possibly

have afforded adequate defense. By liberty of speech here is meant only that freedom from restraint contemplated by the Constitution and not the speaking of words with the intent or necessary result of interfering with the lawful processes of the government.

The value of this fundamental right to the cause of civilization is amply illustrated by German experience. There is good reason to believe that it was the absence of that liberty, more than all other causes, that enabled the war party of Germany to mobilize behind the plans of world dominion the spiritual and intellectual resources of the Empire. When the German leaders of modern internationalism—and there have been a number of distinguished men who had a wider and more humane vision than the government—began to get a following or to apply their theories to German foreign policy, the government was not without means to prevent effective propaganda. Added to this was the stern control of the school system, with the result that the great majority of the people received only the orthodox German conception of the state, diplomacy, and world politics. Upon this basis it was easy to mould the opinion of the German people to the support of German policy. Without freedom and spontaneity of thought, discussion, and education (and these are based upon liberty of speech and press), it was possible for the population of a great nation to be thoroughly organized behind an inhuman and shameless project, unworthy of the noblest and proudest traditions of the people. It is difficult to doubt that if there had been greater freedom of speech and education in Germany for the preceding thirty years, the German program of 1914 would have been outside the realm of possibility.

It should be noted that the movement against freedom of speech in many quarters in America was supported by the unquestioned majority of the people, not because they were not devoted to the principle, but because in the excitement and passion of the hour they had forgotten it. It is this fact that makes the tyranny of the majority so treacherous an evil. For the same reason it is likely to find its most despicable expressions in democracies where there are clearly drawn lines of class, social or racial cleavage, followed by the orthodox prejudices and hatreds usually engendered. "When society is composed of heterogeneous classes," observed Professor J. R. Tucker, "commingled in the same locality, or in different localities; when the interests to be affected by law-making are not alike, but are rivals and antagonistic—the one seeking for some advantage at the expense of the other—contention will arise among constituencies, and will be transferred at their instance, through their respective representatives, to the halls of legislation. The debate between conferees as to the regulation of a common interest would become a fierce war between hostile interests. The representative, in good faith to his constituency, would strive to make laws in their interest, and the laws would be moulded by the motives of the constituencies for the benefit coveted, if their representatives constituted a majority, at the expense and to the injury of those constituencies whose representatives constituted only the minority in the body —powerless to defeat, and only able helplessly to protest. The resistless majority would crush the impotent minority. The interest of the minority would have no true representation, because its representatives would be overborne by the dominant majority. The hand of the majority, which would wield absolute power, is not the

hand of the minority, which holds its right, but the hand of an alien enemy to that right. Power and right are thus divorced, not wedded, and the representative majority would destroy without mercy the unrepresented minority. In such a state of society, the form of representation is no shield for the rights of the minority, but a sword of power for their ruin."[1]

American experience is not without its unfortunate examples of this type of majority tyranny, the product of class or racial antipathy. Discriminatory legislation against the negro race, in one form or another, has been so common as scarcely to attract attention, except an occasional notice in the daily press when some court has held such statutes void. Legislative discrimination has generally not been so bad, for those injured generally contrive to get their pay in court at which time they may plead their constitutional rights. The most significant thing here is to consider what the condition of the negro race would be, were it not for the constitutional bulwarks that preserve it from the tyranny of the majority. An analysis of the statutes, directed against negroes, that the courts have overturned, give us some idea of what that tyranny would be. The worst aspects of this situation are found in the unfair administration of the law against the negro, where the courts cannot always afford adequate redress. The different attitude of many prosecuting attorneys toward offenders of the two races constitutes nothing short of tyranny. But since the attorney is generally elected, and is representing the wishes of the majority, the unfortunate race is without protection. The enactment and discriminating enforcement of laws in some of our states, directed against orientals, affords additional illustrations of majority tyranny in

[1] *Constitution of the United States,* Vol. I, pp. 91-92.

its grosser forms. The author does not mean here to imply any relation between the prevention of majority tyranny with regard to certain peoples and the solution of the race problem in America (although some relation must undoubtedly exist), but merely desires to illustrate that in America we do have problems of tyranny that unrestrained majority rule would accentuate rather than remove.

There has been some tendency in recent times to ignore the facts of majority tyranny and to attribute the constitutional restraints adopted by the Fathers to certain monarchistic tendencies and an antipathy to the principles of democracy. But a careful study of the period would seem to indicate that the Fathers were animated mainly by a sane and practical fear of the evils of majority tyranny, with which they had considerable experience. The revolutionary state constitutions, with their provisions for legislative omnipotence, gave ample opportunities for the demonstration of the evils of unrestrained majorities. In the introduction to his edition of the *Federalist*, Mr. P. L. Ford gives a striking summary of the evils that then prevailed. "Unchecked by the balance usually supplied by manufacturing or commercial interests, the landholding classes, by their legislatures, in turn unchecked by coördinate departments, ran riot. Paper money and tender laws robbed the creditor, regrating and anti-monopoly acts ruined the trader. When the weak state courts, true to the principles of justice, sought to protect the minority, the legislatures suspended their sitting, or turned the judges out of office. The general government, called into existence by the articles of confederation, which had been modeled on the Batavian and Helvetic constitutions, was but a legislative dependent of the state legislatures, with scarcely a shadow of ex-

ecutive or judicial power, and was therefore equally impotent to protect. For the moment a faction of agriculturists reigned supreme, and to the honest and thoughtful, democracy seemed to be digging its own grave, through the apparent inability of the majority to control itself.

"Fortunately injustice to, and robbery of, fellow-citizens eventually injure the wrong-doer as well as the wronged. A time came when the claims of the creditors had been liquidated and the goods of the traders had been confiscated, and the former refused further loans and the latter laid in no new stocks. The capitalist and the merchant were alike ruined or driven from business, and it was the landholder, unable to sell, to buy, or to borrow, who was the eventual sufferer. Such was his plight that he could not in many cases sell even enough of his products to get the money to pay his annual taxes, and this condition very quickly brought home to his own instruments of wrong-doing, the legislatures, the evils they had tried to fasten on the minority. Taxes were unpaid, and, except where the conditions were factitious, the state treasuries became empty. Finally, in an attempt to collect the taxes in Massachusetts, a formidable revolt of tax-payers against the state government was precipitated. Everywhere the state legislatures had become objects of contempt in just so far as they had sinned against classes of citizens, and the people were threatened with a breakdown of all government, by the misuse of majority power. It has been the fashion of historians to blame the Congress of the Confederation with the ills of 1781-1789, but that was an honest, and, when possible, a hard-working body, and the real culprit was not the impotent shadow of national government, possessing almost no powers for good and therefore scarcely any

powers for evil, but the all-powerful state legislatures, which proved again and again, as Jefferson asserted, that 'one hundred and seventy-three despots would surely be as oppressive as one.' "[1]

Such were the conditions that brought the Fathers to the consideration of the problem of constitutional restraints, in order that they might distinguish between mere majority control and real popular government. In doing this they rendered a great service to the cause of democracy and the science of government.

The real importance of preventing majority tyranny does not become apparent, however, until we examine it in the light of its effect upon the existence of a true public opinion as a basis of popular government. We have seen that we cannot have true public opinion unless the minority feel themselves bound to acquiesce in the opinion of the majority. This attitude will never exist in regard to majority action, which is tyrannical in nature, and which runs counter to the deeply embedded prejudices and convictions of the minority. In order to safeguard the very existence of popular government, therefore, it has been necessary to erect constitutional safeguards to protect the minority from such action by the majority as would lead the former to resistance or revolt. "It is safe to say," observes President Lowell, "that if any nation of European origin, with a popular form of government, were now to forbid a part of the citizens to worship according to their consciences, those men would regard the order as beyond the sphere where they were under a moral obligation to obey. A similar feeling would certainly be caused by the proscription of political opponents, by laws, for example, which sent them to the scaffold or into exile. It might be provoked

[1] *The Federalist*, pp. ix-xi.

by extreme legislation on other subjects, such as the relations of parents and children or a general attack on the right to private property."[1]

Mr. G. Lowes Dickinson has given us an excellent statement of this important limitation upon the possibilities of popular government. "Government by the majority is a convenient means of conducting national affairs, where and in so far as there is a basis of general agreement deeper and more persistent than the variations of surface opinion; but as soon as a really fundamental point is touched, as soon as a primary instinct, whether of self-preservation or of justice, begins to be seriously and continuously outraged, the democratic convention gives way. No minority, for example, even in a compact modern state, either would or ought to submit to a decision of the majority to prohibit the exercise of their religion. Such a decision could only be carried into effect by force, subject to the contingency of armed rebellion; and orderly government would dissolve into veiled or open civil war. * * * It is the presupposition of all democratic government that certain principles, tacitly understood if not precisely formulated, will in practice be observed by any party that may be in power. * * * And, in my opinion, the realization of the political ideal of the extremer Socialists, and the attempt by that particular method to effect a social revolution, without any fair consideration for the claims of owners of property, would simply result in the collapse of the whole convention on which the possibility of government depends."[2]

"Even in the most firmly established democracies," again quoting from President Lowell, "there are ques-

[1] *Public Opinion and Popular Government*, p. 42.

[2] *The Development of Parliament During the Nineteenth Century*, pp. 161-62.

tions touching a chord of feeling so deep that the minority would not voluntarily submit to the decision of the majority. To such matters a genuine public opinion cannot apply, and they lie, therefore, beyond the province of popular government. What these matters are cannot be determined by any universal formula, because they vary from place to place and from time to time; but it is the part of wise statesmanship to recognize them and avoid them if possible. Although in any nation there may come periods of revolutionary change when questions of this kind force themselves to the front, yet we must remember that to agitate needlessly subjects lying beyond the range of a true public opinion tends to undermine the foundation of popular institutions. A successful democracy which pursues its course without shocks, which works without violence and without oppression, must be one where the limits of a possible public opinion are generally understood and observed."[1]

It follows, therefore, that a people that would govern themselves wisely should seek to limit their own powers and to place restraints upon their own action in behalf of those principles which a careful and deliberate study of democratic government shows to be essential to its success. The critics of this system seem determined to regard these constitutional limitations as a type of tyranny created by some alien power, rather than as self-imposed restraints. They frequently insist that it raises the question of whether the people or the court shall rule. Under our constitutional system there is no doubt but that in the long run the people rule. The question we must here consider is how shall they rule, if they would rule the most wisely? If there are certain fundamental principles such as religious liberty, freedom

[1] *Public Opinion and Popular Government*, p. 44.

of speech, the rights of property and the inviolability of contract obligations, the preservation of which are of great importance to popular government, and which experience shows the people may forget in the time of popular passion or excitement, is it not the part of wisdom for the people to impose upon themselves such limitations as will check hasty and ill-considered action?

Successful men deliberately formulate certain fundamental principles for their lives, which careful study and thought have shown to be essential to successful living, and they accept these principles as self-imposed restraints to guide their action against the time when the passion or strain of the moment may pervert their judgment. Efficient business undertakings have "house policies" which are carefully studied out, and in which are embodied the ablest thought of the enterprise, and these are rigidly adhered to in the solution of daily problems, in order that in the haste and stress necessitated by the conditions of modern business, decisions may be wisely and safely made. Whist players, who attain great proficiency, have studied out certain general rules which they accept as binding on their judgments in the playing of the game, realizing that in certain fundamental matters a mature and carefully considered principle of conduct is a safer guide than the snap decision of the moment. The whole body of rules, generally known as practical laws, are formulated upon this same common-sense theory, that in all the activities of life there are generally certain fundamental principles of right, proper, or efficient conduct, which a special and deliberate study of the situation will disclose, and which a wise and prudent person will ascertain and accept as limiting his exercise of daily judgment, until later study or investigation will have disclosed a still better principle of conduct.

The argument for the adoption of constitutional restraints proceeds upon the same basis. Its advocates see no reason why the same principles of common sense and prudence that prevail among all successful men and businesses should not prevail in government. There can be no doubt that there are certain fundamental principles of government, such as religious liberty, the rights of property and freedom of speech, which are so obviously essential to any form of progressive government, and absolutely indispensable to the life of a democracy, that no people should attempt hastily to ignore them. If constitutional restraints are limited to those principles and ideas which human experience has demonstrated to be absolutely essential to the best interests of the race, then constitutional restraints, in their behalf, would seem to be the part of obvious wisdom.

One of the things that has tended to bring this system into disrepute has been the failure of the people to distinguish between those fundamental principles which history and experience have demonstrated to be fundamental to the life of society, and ordinary matters of legislation, still in the period of uncertainty, and still to be vindicated by the lessons of experience. Obviously those matters should not be included in the constitution, but should be left in the body of statutory law, where they can be changed, altered, or repealed, as experience may indicate. The recent tendency to write long state constitutions, including ordinary matters of policy, together with the common use of the initiative and referendum in ordinary legislation, and the increasing ease with which the new state constitutions may be amended, have all contributed to the popular confusion between fundamental law and ordinary legislation. If matters of merely temporary expediency are to be included in the

constitution, then it should be easily amended, but this ignores the distinction that ought to prevail between statutory law and constitutional law, and this difference must be kept clear if the doctrine of constitutional restraints is to be preserved in its original vigor and effectiveness.

Constitutional restraints should be confined, therefore, to the fundamental principles, demonstrated by history and experience to be essential to the safety of society, such as personal and religious liberty, freedom of speech, due process of law, the inviolability of contract obligations, and ex post facto guarantees.

But it may be inquired why the constitution, drawn up by the representatives of the people, in convention assembled, and subsequently ratified by popular vote, should have priority over the action of the representatives assembled in the legislature, and subsequently approved by referendum vote. There are three reasons to justify that priority. The first is the one already considered, viz., that the constitution should contain only fundamental principles about whose wisdom and soundness there can be no reasonable doubt. On the other hand, by the very nature of the case, the legislature is compelled to deal with current matters, with pressing details, and with new problems which require various kinds of legislative relief, about the wisdom of which it is impossible to speak with any degree of certainty or finality.

The second reason for giving priority to the work of the constitutional convention is that since it is dealing with general principles only, it is dealing with them from a more judicial viewpoint, and free from the pressing necessities of immediate need, which tend to warp and bias the judgment of the legislature, as that body, with its eyes upon immediate problems, is more likely to overlook the great fundamental principles that underlie all

government. The same is true of public opinion. In operating upon the general provisions of a constitution, it is more likely to be reasonable and judicious in its judgment, than if operating upon some particular law which may embody constitutional principles, since in the latter case it is inevitable that the popular feeling will be more largely influenced by the immediate and concrete demand for the legislation, than by a regard for the abstract principles of constitutional law. This may be very easily illustrated as follows. There was no time during the war when the people would have failed to have voted overwhelmingly in favor of the constitutional provision for freedom of speech, but at the same time there were many times and places where these same persons would have voted for laws interfering with those same constitutional rights, if such laws were directed against German sympathizers. The passion and interest aroused by the concrete object in mind would have led them to forget or ignore the fundamental principle that might have been involved.

The third reason for this priority in favor of the convention, is the simple fact that the experience of American politics leads unquestionably to the conclusion that the type of men in our constitutional conventions and the work done by them are infinitely superior to the type of men generally found in the state legislature and to the work generally there performed. A constitutional convention generally interests the ablest and greatest public men of the state and they participate either directly as members or indirectly as advisers. The result is that the work there done, because of the abler type of men, the greater public interest, the absence of much of the petty partisan intrigue, and the more fundamental point of view from which they approach their problems, is of such

a character as to merit a high degree of public confidence. It would seem the part of wisdom not to permit ordinary legislation to override the results of their deliberations, without that degree of effort and time for careful consideration that is required by the process of constitutional amendment. For it must be remembered that the existence of constitutional restraints does not imply absolute barriers, but merely seeks to check legislative action, interfering with fundamental rights, for the period of time required by the process of amendment.

We come now to consider the methods by which these constitutional restraints may be enforced. Here, after all, is the real battle ground of constitutional limitations. It is not so much the abstract theory of constitutional restraints that awakens such violent opposition from radicals, as it is the policy of judicial review by which they are enforced. The radicals argue that the legislature is in closer touch with the public and with public need, and that it can better be trusted than the courts with the enforcements of these restraints. This argument largely ignores the fact that one of the very prime purposes of constitutional restraints is to protect these fundamental rights against the tyranny of the people. If this is to be effective, the enforcement of such restraints should be vested in that department of government farthest removed, rather than in the one in closest touch with popular clamor. The abolition of judicial review, by which the courts hold all legislation to be void if in conflict with constitutional restraints, would be to leave the people with no protection for their fundamental rights, except such as might arise out of the moral obligation of the legislature not to violate any principles included in the fundamental law.

Fortunately we are not without some evidence as to how effective these moral obligations have been in restraining legislative action. Justice L. A. Emery has collected some material on this aspect of the question which shows that constitutional restrictions upon legislative action, when left to the legislature to apply, very frequently amount to nothing. "Perhaps," writes Mr. Emery, "the judgment of those urging that the legislature should be trusted not to trespass on the constitutional rights of the people may be enlightened by recalling some instances of legislative action upon constitutional questions left to its decision by the constitution itself. It is hardly necessary to cite instances of the abuse of this power in the matter of determining who are entitled to seats in the legislature. It is common knowledge that, in the past at least, both law and fact have often been over-ridden for partisan advantage. * * *

"* * * In many states there is a constitutional provision that no legislative act shall become effective until after a specified time has elapsed from its enactment 'except in cases of emergency,' which emergency, however, is to be declared in the act itself. This provision, of course, is to give the people time to understand the statute and prepare to obey it. The word 'emergency' in the exception implies a sudden, unexpected happening. It is defined in Webster as a 'pressing necessity; an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy.' In Indiana in one legislative session, out of 200 acts, 155 were made to take effect at once by a recital that an emergency existed therefor. In Illinois a two-thirds vote of all the members elected to each house is required for the adoption of the emergency clause. Among the acts of the last session containing the emergency clause was one appropriating $600 for print-

ing the report of a monument association. In Tennessee the exception was of cases where 'the public welfare' required an earlier date. Out of 265 laws passed at one session 230 contained the declaration that the public welfare required their going into effect immediately. In Texas the constitution provides that no bill shall be passed until it has been read on three several days in each house and free discussion allowed thereon, but that 'in cases of imperative public necessity four-fifths of the house may suspend the rule.' Out of 118 laws passed at one session all but five contained the statement that 'imperative public necessity' required suspension of the rule."[1]

These and other incidents cited by the same writer indicate very clearly that constitutional restraints upon legislative action, when left to the legislature to enforce, are more frequently violated than observed. If a real doctrine of constitutional restraints is to be preserved, therefore, it must have some other more substantial guarantee than the voluntary observance of the legislature.

To those who argue that Great Britain has no doctrine of judicial review and therefore that none is necessary in America, Mr. Emery makes the following very telling reply. "Though Great Britain, our mother country, has no written constitution and no judiciary empowered to enforce its limitations, it is the happy possessor of a practically homogeneous people of the Anglo-Saxon race, little affected by immigration, and imbued for centuries with a deep regard for personal liberty and private rights. Yet, even there today, statutes are demanded and sometimes enacted in derogation of them. In this country the population as the result of great immigration is more heterogeneous. It comprises races and peoples of diverse

[1]In re Lee Sing, 43 Fed. Rep., p. 359.

temperaments, of diverse experiences, of diverse traditions, many unschooled in self-government and lacking in that traditional reverence for liberty and order so characteristic of the Teutonic races. We even find some classes openly declaring that if they can get possession of the government they will exploit the rest of the people for their own benefit. They essay also to bargain their votes for special legislation in their favor at the expense of the people at large and without regard to the principles of equality of right.

"With such a population with its universal suffrage, were it not for our written constitutions with their Bills of Rights and with an independent judiciary to guard them, there would be no security here for personal liberty and rights."[1]

It is worthy of note that those who protest against the doctrine of judicial review regarding constitutional restraints, do not object to it regarding theh constitutional division of powers between the federal and state governments. Why is this true? Why cannot the representatives of the people in Congress be trusted to pass no law that will encroach upon the constitutional prerogative of the states? No one, except the most extreme advocate of national centralization, who was ready to see the states reduced to mere administrative subdivisions of the nation, would tolerate such a thought. And yet there is no reason to believe that the representatives of the people would be more considerate of the constitutional rights of individuals than they would be of the established prerogative of the state.

If there is still any doubt as to the ineffectiveness of constitutional provisions, when left to the mercy of legislative determination, one need but to acquaint oneself

[1] *Ibid.*, pp. 162-163.

with some of the five or six hundred laws that the courts have overturned because in conflict with the fundamental law. This will become more significant when it is recalled that these legislatures, like the courts, have taken the oath to observe and uphold the constitution of the land. One or two examples will suffice. About 1890 the city and county of San Francisco enacted an ordinance making it unlawful for any Chinese to live or carry on his business within the said county except within a special section set aside for them, and giving them just sixty days within which they must either leave the county or move to the section specified, under a heavy penalty. This outrageous act of tyranny, which reads more like a Turkish mandate regarding the Armenians, than a city ordinance enacted in a democratic country, was held void by the federal courts, as interfering with the due process guarantees of the Constitution. In holding the law void the court used the following vigorous language: "The obvious purpose of this order, is, to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than forty years. Many of them were born there, in their own houses, and are citizens of the United States, entitled to all the rights and privileges under the Constitution and laws of the United States, that are lawfully enjoyed by any other citizen of the United States. They all, without distinction or exception, are to leave their homes and property, occupied for nearly half a century,

and go, either out of the city and county, or to a section with prescribed limits, within the city and county, now owned by them, or by the city. This, besides being discriminating against the Chinese, and unequal in its operation as between them and all others, is simply an arbitrary confiscation of their homes and property, a depriving them of it, without due process or any process of law. And what little there would be left after abandoning their homes and various places of business would again be confiscated in compulsorily buying lands in the only place assigned to them, and which they do not own, upon such exorbitant terms as the present owners with the advantage given them would certainly impose. * * *

"That this ordinance is a direct violation of not only the express provisions of the Constitution of the United States, in several particulars, but also of the express provision of our several treaties with China, and of the statutes of the United States, is so obvious, that I shall not waste more time, or words in discussing the matter. To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds, which are so constituted, that the invalidity of this ordinance is not apparent upon inspection, and comparison with the provisions of the Constitution, treaties and laws cited, discussion or argument would be useless."[1] Other cases of similar nature are familiar to the student of constitutional law, while the repeated efforts of states and municipalities to repudiate their honestly incurred indebtedness, and which have been thwarted only by the action of the courts, afford undeniable evidence of the necessity of the doctrine of judicial review, not only to protect the minority against the tyranny of the majority, but to protect the temporary

[1] In re Lee Sing, 43 Fed. Rep. 359.

majority from the dire consequences of its momentary cupidity and greed.

Those who oppose the doctrine of judicial review argue in favor of permitting such arbitrary and vicious conduct. It is true that the doctrine has occasionally interfered with legislation that has seemed desirable, either because of the error of the court, or because in some special case the constitutional provision seemed to work a hardship. Such occasional defects inhere in any system of human government. But in a government such as ours, representing fundamental differences in racial and economic interests, and with such a large percentage of foreigners among us, the probabilities of majority tyranny are so obvious, that a repudiation of the doctrine of constitutional restraints and judicial review would seem a positive menace, not only to the fundamental rights of the minority, but to that spirit of national unity which can come only with the adequate protection of such rights. Nothing will so surely destroy the possibilities of real democracy as the creation of irreconcilable minorities through oppression by the majority.

One difficulty here should be noted. Many writers whose position is such as to entitle them to great respect, have opposed the doctrine of judicial review, not merely because they deemed it unwise, but because they regarded it as unwarranted by the Constitution, and as an act of judicial usurpation. Fortunately such well-known men as Professors Beard,[1] Corwin,[2] and others have carefully investigated the historic evidence and have come to the conclusions that the framers of the Constitution, and the leaders of public opinion who labored for its adoption, regarded the Constitution as vesting the courts with this

[1] *The Supreme Court and the Constitution.*
[2] *The Doctrine of Judicial Review.*

important power. These investigations leave no other basis to support the charge of judicial usurpation than the easy-going assumptions of the critics and the exigencies of political abuse.

It is only from an understanding of the importance of judicial review in resisting majority tyranny that one can comprehend the real importance of the independence of the judiciary. Its importance is not a mere matter of abstract political logic, as many have apparently thought, but consists in the very nature of its function. If people adopt restraints against governmental power and their own hasty and intemperate action, obviously the enforcement of those restraints, to be effective, must be confided to some department of the government, free from the immediate influence of the public and the domination of the government. It is only in this manner that constitutional provisions may be made supreme. Professor Dicey, in commenting upon the powers and organizations of the supreme court, has declared that the "glory of the founders of the United States is to have devised or adopted arrangements under which the constitution became in reality as well as in name the supreme law of the land."[1]

"No honest, clear-headed man," declared President Taft, "however great a lover of popular government, can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a government tyrannical and cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority. * * * In order to maintain the rights of the minority and the indi-

[1] *Law of the Constitution*, p. 154.

vidual and to preserve our constitutional balance, we must have judges with courage to decide against the majority when justice and law require."[1]

It has appeared from the foregoing discussion that the possibilities of majority tyranny and the abuse of official power are fundamental evils, even under a system of popular control. The existence of a real public opinion will be very difficult to secure wherever these evils flourish. To guard against them, constitutional restraints, prohibiting arbitrary and unjust action, have been written into our fundamental law. To secure their enforcement an independent judiciary has been created, and vested with the power to see that acts, inconsistent with such restraints, shall be null and void. Mistakes have been made in the enforcement of these restraints. Provisions have been written into the fundamental law which should never have been adopted. Incompetent courts have occasionally abused the power. But when an examination is made of the evils that have been prevented, the good seems greatly to exceed the evil. There seems no reason why a democracy should not adopt the commonly accepted methods of human experience—the formulation of fundamental principles of conduct for the safeguarding of daily action against the temptations of the moment—in order to insure its members against the hasty or intemperate exercise of arbitrary power.

[1] *Special Message to Congress*, Aug. 15, 1911.

SUGGESTIVE QUESTIONS FOR

CHAPTER VII

I. Are there any instances of majority tyranny in the United States other than those mentioned in this chapter? What are they?

II. Are there any subjects in relation to which a group of irreconcilables could be created in the United States by improper legislation? What are they?

III. In what ways, if any, could majority tyranny be prevented or made difficult?

IV. In what ways, if any, could legislation on subjects likely to create irreconcilables be made difficult?

V. "Constitutional restraints defeat the will of the people and have no place in popular government." Criticize the foregoing.

VI. What classes of matters should be included in a written constitution? Generally speaking, should a written constitution be long or short?

VII. Are there any spheres of private right with which you think government should not be allowed to deal? What are they? How can they be protected?

VIII. The critics of the doctrine of judicial review generally admit its necessity, in regard to determining the constitutional limitations between the powers of the federal and state governments. If the observance of these constitutional rules cannot be safely entrusted to the legislature, is there any reason to believe that the observance of the other constitutional guarantees may be safely left to legislative discretion?

IX. Has the existence of effective constitutional restraints against the repudiation of public debts by cities and states had any effect upon the credit and borrowing power of American states and municipalities? Contrast the credit of the states before and after the adoption of the federal constitution which contained these restraints.

X. Is it ever to the permanent advantage of a state to repudiate its legally created debts?

CHAPTER VIII

THE RECALL OF JUDICIAL DECISIONS

THE movement for direct democracy found its logical climax in the recall of judicial decisions. It was but natural that those who could see no limitations in the nature of public opinion, and who could comprehend few difficulties in applying it to any of the complicated problems of modern life, should have undertaken its application to the review of judicial action. Impatient of the restraints imposed by the orderly and constitutional processes of the law, as well as of the delays necessitated by the inherent difficulties of novel and complicated problems, eager for an easy and simple remedy for the intricate ills from which society was suffering, and with an amazing confidence in the wisdom of the majority, the advocates of the new measure argued enthusiastically for its adoption. Laws had been declared void that they thought were valid. Badly framed legislation had failed to give the results that had been expected. Hastily drafted laws were found to be inadequate in meeting the evils at which they were directed. These conditions, together with the popular dissatisfaction over the delays and expense of litigation, gave to any attack upon the courts the politically strategic position that comes from immediate popularity.

The specific proposal, as stated by its most scholarly advocate, Professor William Draper Lewis, is as follows: "If an act of the legislature is declared by the state courts to violate a provision in the state constitution, after an interval for deliberation, the people of the state

shall have an opportunity to vote on the question whether they desire to have the act become a law in spite of the opinion of the court that it is contrary to the constitution."[1] This, together with the following statement by Colonel Roosevelt, affords a reasonably definite statement of the proposition as a basis of our discussion: "(1) I am not proposing anything in connection with the Supreme Court of the United States, or with the Federal Constitution.

"(2) I am not proposing anything having any connection with ordinary suits, civil or criminal, as between individuals.

"(3) I am not speaking of the recall of judges.

"(4) I am proposing merely that in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law—which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion—be submitted for final determination to a vote of the people, taken after due time for consideration."[2]

Later on it appears that the recall should only be applied to those state cases involving the police power, where the court has held the statute void because in conflict with the due process clause of the Constitution. It should also be added that the purpose of the recall is the specific amendment of the Constitution, rather than a reversal of the decision of the court. In other words, if a law is held void because in conflict with the due process provisions of the Constitution, and the majority of the people vote in favor of the recall, the vote does not re-

[1] "New Method of Constitutional Amendment by Popular Vote" in *Annals of the American Academy*, Vol. XLIII, p. 311.

[2] "Right of the People to Rule" in *Outlook*, Vol. 100, p. 618.

verse the decision of the court, but instead amends the Constitution so that in the future the due process clause will not prohibit the specific statute involved in the decision.

This squarely raises the question as to the wisdom of having a popular vote (not taken on the abstract, impersonal, general principles of the Constitution, but taken with reference to a specific, concrete, and perhaps pressing need), determine the application of one of the fundamental principles of the Constitution to a situation invoking its protection. We have seen that the purpose of constitutional restraints is to protect the individual against the abuse of official power, to defend the rights of the minority against the tyranny of the majority, and to safeguard the people against their own hasty judgments that might be perverted by passing passion. Does the recall of judicial decisions impair these fundamental safeguards? Will such a vote, under such conditions, register a calm, temperate judgment of the people as to the relative merits of the two principles that clash? Is this the most effective way in which the voice of the public can speak upon a subject of such paramount importance? Will such a vote be likely to register a real public opinion upon the fundamental merits of the case? These are the questions that must be considered.

The case for the adoption of the recall of judicial decisions rests upon two fundamental propositions, which we will now consider. The first is that the scientific and proper test of what constitutes "due process of law" is the "preponderant opinion of the people." This amazing proposition was stated by Colonel Roosevelt as follows: "I have insisted that the true construction of 'due process' is that pronounced by Justice Holmes in delivering the unanimous opinion of the Supreme Court of the United States, when he said:

" 'The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'

"I insist that the decision of the New York Court of Appeals in the Ives case, which set aside the will of the majority of the people as to the compensation of injured workmen in dangerous trades, was intolerable and based on a wrong political philosophy. I urge that in such cases where the courts construe the due process clause as if property rights, to the exclusion of human rights, had a first mortgage on the Constitution, the people may, after sober deliberation, vote, and finally determine whether the law which the court set aside shall be valid or not. By this method can be clearly and finally ascertained the preponderant opinion of the people which Justice Holmes makes the test of due process in the case of laws enacted in the exercise of the police power. The ordinary methods now in vogue of amending the Constitution have in actual practice proved wholly inadequate to secure justice in such cases with reasonable speed, and cause intolerable delay and injustice, and those who stand against the changes I propose are champions of wrong and injustice, and of tyranny by the wealthy and the strong over the weak and helpless."[1]

It must be admitted that in resting their case on this proposition, the advocates of the recall of decisions chose their ground with considerable shrewdness, when they limited its application to cases involving "due process of law" and the "police power." The indefiniteness which surrounds the use of these two general phrases gives a plausible pretext for their thesis, which would have

[1] *Ibid.*

been lacking had they encountered some of the more definite constitutional guarantees. As it is they have no authority for the proposition, other than the unfortunate dicta of Mr. Justice Holmes. It is perhaps significant that they have attempted no legal, logical, or historical defense of their startling doctrine, although it constitutes the very foundation of their case. In dealing with a blanket provision like "due process," where its necessary indefiniteness allows considerable play for other factors than strict legal logic and precedent to determine its meaning and application, there is always room for speculation as to what those other factors are. Doubtless "the prevailing morality or strong and preponderant opinion" of the people has its influence among the other unascertainable factors in the situation. To the extent that the proposition contains any justification, the author believes it is only within the limits here noted. But this is a vastly different thing from proving that the only proper test of the meaning of due process is the preponderant opinion of the people.

In the first place the proposition does not square with the accepted theory of the courts. While the courts have declined to attempt the difficult task of a final definition of "due process of law," it is perfectly clear from a study of the cases that it has a meaning independent and above the preponderant opinion of the people. The courts have construed it as a protection to individuals of those natural and inalienable rights that exist independently of all government. Stated in its more modern form, it is a guarantee to private right against arbitrary action or against governmental interference, except where reasonably made in the furtherance of some legitimate purpose of government. When is an interference "reasonable" is a difficult question and lies within the sound discretion

of the court. In determining what are the legitimate purposes of government, the courts have generally adopted the historical point of view and had recourse to the legal and governmental theories prevalent at the time the Constitution was adopted. They have also frequently referred to established usage, custom, or opinion as *evidence* of what constitutes such a purpose. In the application of due process, the courts have been profoundly influenced by the theories and philosophy underlying the common law, and their attempt to determine what is an arbitrary interference with private right has frequently seemed to be an effort to retain substantially the same degree of relativity between private right and public welfare that prevailed in the theories of the common law. As new and greater public needs appeared the courts have seemed willing to allow corresponding increases in the restraints on private rights, thus seeking to preserve the established balance between the two.

The following quotation from Hurtado v. California,[1] a leading case in defining the meaning of "due process," clearly establishes the principle that the provision under discussion has an important, independent meaning and that instead of being identical with public opinion that its purpose is to protect the rights of minorities "against the power of numbers." "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into the bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that as these broad

[1] 110 U. S., p. 516.

and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. * * *

"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the government, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In the quotation from Mr. Justice Holmes upon which so much reliance has been placed, it would be inaccurate to impute the meaning which has been implied by the advocates of the recall. In determining whether a given interference with private right is a reasonable method of furthering some legitimate purpose of government, the

court will frequently have recourse to "usage and preponderant opinion" as evidence to be considered, particularly when a clear statement of all the facts and conditions is not at hand. In Otis and Gassman v. Parker[1] the supreme court, in a decision written by Mr. Justice Holmes, had occasion to deal with the relation of public opinion to the constitutionality of a police power regulation, the validity of which had been attacked as in conflict with due process. The law prohibited all contracts for the sale of corporate stocks on margin or for future delivery. The specific question before the court was whether this was a reasonable means of accomplishing a legitimate purpose of government, viz., the prevention of gambling, or whether it was an arbitrary interference with private rights. The court said: "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. *Such a deep-seated conviction is entitled to great respect.* If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, *unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.'* " (The italics are the author's.)

It should be noted here that although there was a "deep-seated conviction" the court did not regard that as final, but only "entitled to great respect," and that even then the court would interfere if there was "a clear unmistakable infringement of rights secured by the fundamental law." Here is a specific utterance by the same

[1]187 U. S., p. 606.

justice to the effect that a deep-seated conviction (not a mere preponderant opinion), would be interfered with by the court if in clear conflict with the due process provision of the Constitution.

The second objection to the soundness of the theory of preponderant opinion is that it is absolutely inconsistent with the doctrine of constitutional restraints and judicial review, of which the due process clause is an inherent part. There can be no doubt that the Bill of Rights was adopted, among other things, to prevent the tyranny of the majority. To make this effective there were adopted the theories of judicial review and the independence of the judiciary, in order that the people might not indirectly evade those restraints through the manipulation of the courts. In the face of these unquestioned facts, to argue that due process means that which is sanctioned by prevailing opinion, is to formulate a theory which is absolutely in defiance of established fact. To accept this theory would be to repudiate the specific purpose and intent with which the doctrine of constitutional restraints and judicial independence was created. The judicial adoption of such a principle would be a palpable rejection of the obvious purpose and intention of the Constitution, a deliberate and fundamental alteration of that instrument by the process of judicial usurpation.

Let us now examine this theory in the light of its practical operation. In the preceding chapter we considered the case In re Lee Sing, in which the city and county of San Francisco, California, enacted an ordinance compelling all Chinese persons to move their residence and places of business to a certain designated district, or outside of the city, within a period of sixty days. It was a brutal and tyrannical exercise of governmental power which the court immediately held to be void. Does any

one suppose that the court would have held differently upon the proper proof that the prevailing opinion of the people of that state favored such discrimination? The facts seemed to be that public opinion did favor that and similar legislation very strongly. Did it for that reason become constitutional? Should it for that reason have become a valid exercise of power? And yet that is the position that the advocates of the recall would be forced to take.

In some states there has been a strong public opinion in favor of denying to certain races access to specified businesses and occupations, and such attempts have actually been made under some pretext of legitimate public policy. Does the fact that it is prompted by the desire of the majority make it valid? Is it the part of sound wisdom and good public policy, and does it accord with the best traditions of American freedom and love of justice, to create a device by which a majority of the public, aroused for the time being by racial prejudice and hatred, could the more easily consummate such a program of injustice and tyranny? This is one aspect of the application of the recall that its honest advocates must squarely face. They seem to go on the pleasant assumption that it will be used only to correct unfortunate mistakes. But this assumption of majority omnipotence is violently negatived by the facts of American experiences. To this assumption, Mr. Elihu Root, in addressing the New York Bar Association, made an eloquent and forceful protest. "A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever, in any particular case, it is the wish of a majority of its voters to

do so, establishes as complete a contradiction to the fundamenal principles of our Government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influence of declared principles of action."

Since due process of law means something more than the preponderant opinion of the people, and since its meaning involves questions of the most complicated and intangible nature, the question then remains as to the best meaning of interpreting and applying it. Can this delicate and important task be best done by a court, trained and schooled in the technique and policy of the law, and where decisions are only rendered after a careful hearing and investigation by attorneys and specialists on both sides of the case? Or shall we gain better results by allowing such a judgment of experts to be overruled by a vote of the people, who are not lawyers, who are not experts, and who have never heard arguments or examined the facts on either side? Under which system shall we secure the keenest, the most searching, and the most statesmanlike interpretation of this fundamental guarantee? In which way can the people govern themselves the most wisely, by trying to perform this technical and delicate task themselves, or by confiding it to an independent judiciary, who have been selected because of their peculiar abilities for this specific task, and whose

decision is made only after careful hearing and investigation, and under circumstances that secure the best guarantees of a temperate, honest, and impartial judgment?

Perhaps a little more light may be thrown upon this situation by the consideration of one of the decisions that has been the basis of much of the criticism of the courts. The state legislature of New York enacted a law prohibiting the employment of laborers in bake shops more than ten hours per day. On a writ of error to the United States Supreme Court, it was contended that the law was void because in conflict with the due process provision of the Constitution, in that it constituted an arbitrary interference with the liberty of contract of the employer and employee. The law was held unconstitutional by a five to four decision.[1] The validity of the law as an interference with liberty of contract was defended upon the ground that this particular regulation of private right was a reasonable method of accomplishing one of the legitimate purposes of government, viz., the protection of the public health. It was admitted that the protection of public health was a legitimate purpose of government, and that a reasonable regulation of individual right, that would contribute materially to that end, would be a constitutional exercise of the police power. The majority of the court, speaking through Mr. Justice Peckham, were of the opinion that the statute in question had no material relation to the health of the public or the workers, and therefore, that the law was merely an arbitrary interference with private rights and within the prohibition of the due process clause.

The following quotations from the opinion of the majority indicate very clearly their position. "It must, of course, be conceded that there is a limit to the valid

[1] *Lochner v. New York*, 198 U. S., p. 45.

exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the fourteenth amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. * * *

"It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor. * * *

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker."

The point of conflict between the majority and the minority is illustrated in these words from the dissenting opinion of Mr. Justice Harlan. "There are many reasons of a weighty, substantial character, based upon

the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

"If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States."

The significant thing about this decision is that the only point of difference between the two decisions is as to whether the law did or did not affect the public health. There was no difference as to the meaning of the Constitution. It was purely a question of fact. The minority thought that working over ten hours a day might materially affect the health of the workers, and the majority thought otherwise. It is the opinion of the writer that the minority were right. It necessarily follows that an accurate disposition of this particular case (and there are many other cases that likewise turn on questions of fact) depended upon an adequate survey of the facts and conditions that were involved. This would have involved an investigation of the conditions under which laborers worked in the bake shops of New York, the nature of their work, and the effect of these conditions upon the health of a normal man. If they worked in hot, ill-ventilated bake shops, where there was much flour and dust in the air, and if such conditions were conducive to tuberculosis, it is conceivable that bake shops might become the distributing centers for the germs of this disease. To have come to an intelligent judgment here, it

would have been necessary to have had the results of a careful survey of the bake shops as well as the expert advice of authorities on public health who could have explained what relations, if any, existed between the actual conditions in the shops and the health of a normal man. Unfortunately the court had no such machinery by which such an investigation could have been made and the resourcefulness and ingenuity of counsel had not been adequate to the task, with the result that the court was compelled to decide the matter according to its own unguided judgment.

Another excellent illustration of this same situation is afforded by the well-known case of In re Jacobs,[1] which has also been the object of much criticism by those who favor the recall. The statute in question prohibited "the manufacture of cigars" and the "preparation of tobacco in any form" on any floor of any building in which more than three families lived "independently of one another" and did their cooking upon the premises. The law was limited to cities of over 500,000 population. The relator was arrested for the manufacture of cigars in such a building. It was a building of four stories, there being one apartment of seven rooms on each floor. The relator lived with his wife and two children in one of these apartments and used one of the rooms for his work. The evidence showed that the smell of the tobacco did not penetrate to the other rooms of the apartment. The court held the law to be void on the ground that there was no reasonable relation between the interference with private rights and the public health which was supposed to be the purpose of the act. The court said: "Nor was it (the statute) intended to improve or protect the health of the occupants of tenement houses. If there are but three fami-

[1] 98 N. Y., p. 98.

lies in the tenement house, however numerous or gregarious their members may be, the manufacture is not forbidden; and it matters not how large the number of the occupants may be if they are not divided into more than three families living and cooking independently. * * * What possible relation to the health of the occupants of a large tenement house would cigar making in one of its remote rooms have? If the legislature had in mind the protection of the occupants of tenement houses, why was the fact confined in its operations to the two cities only? It is plain that this is not a health law, and that it has no relation whatever to the public health. * * * When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

In commenting on this case on a previous occasion the writer made the following statement which seems pertinent here: "It is clear from the foregoing that this decision turned on the question of fact, of whether there was any reasonable relation between the interference of private rights and the interests of public health. The court may have been mistaken in its judgment, but the mistake was one of fact and not of law. While it must be admitted that the court did not seem anxious to resolve all doubts in favor of the validity of the statute, it does not appear obvious, at least to those uninitiated into the technical facts regarding tenement house conditions and the effects of the smell of tobacco upon health, that there

was any reasonable relation between the act and the public health. Such might appear to be the fact if the proper evidence was available. If the manufacture of tobacco in the same building where people live is injurious to their health, and that fact can be scientifically demonstrated, there can be no doubt that a statute carefully adjusted to the particular problem would be upheld. It is the writer's firm belief that practically all legislation that can be scientifically demonstrated to be desirable can be maintained in the courts. It is well to remember, however, that in such cases the validity of the legislation will largely depend upon technical questions of fact, which, perhaps, the housing expert may alone possess, and which the courts have no machinery to acquire. Those interested in housing legislation would render a valuable service if they could keep in touch with all litigation involving the constitutional validity of housing laws in order to see that counsel in charge are familiar with the particular facts which form the constitutional justification for the law."[1]

Here is a very practical problem that lies at the very basis of much of the difficulty with judicial decisions involving conflicts between the police power and due process. These decisions to a very large extent depend upon the facts and conditions of life to which the legislation is applied. As our civilization and life becomes increasingly complex, these facts become increasingly difficult of solution, and yet the wise administration of law depends upon their accurate determination. And yet we have made no effort to provide the courts with the machinery and the methods of solving the problems that we have forced upon them. Instead we are spending our time and effort in destructive criticism.

[1] "Housing Problems in America," *Proceedings of the Fourth National Conference on Housing*, 1915, pp. 13-14.

Professor Pound has made an apt suggestion toward the solution of this very pressing problem. "Before we can have sound theories here we need facts on which to build them. Even after we get sound theories, we shall need facts to enable us to apply them. Hard as it is for legislators to ascertain social facts, it is even more difficult for courts with the machinery which our judicial organization affords. As a general proposition, courts have no adequate machinery for getting at the facts required for the exercise of their necessary law-making function. As things are, our courts must decide on the basis of matters of general knowledge and on supposed accepted principles of uniform application. Except as counsel furnish material in their printed arguments, the court has no facilities for obtaining knowledge of social facts comparable to hearings before committees, testimony of specialists who have conducted detailed investigations, and other means of the sort available to the legislature. Yet judges must make law as well as apply it, and judicial reference bureaus not remotely unlike Dr. McCarthy's epoch-making contribution to practical legislative law-making are not unlikely to develop. The laboratories and staffs of experts which are coming to be attached to some Continental tribunals strongly suggest this."[1]

This importance of the accurate determination of the facts and conditions involved in judicial decisions where the police power and due process are involved, is recognized by Professor Lewis in his very able article in defense of the recall. "The widespread feeling among laymen against courts, and even against written constitutions, which is a new and, I believe, an alarming feature

[1] "Legislation as a Social Function," *Am. Jour. of Sociology*, May, 1913, p. 767.

in the current thought of the day, is due to the action of the courts in holding unconstitutional much of the legislation designed to rectify some of the more glaring evils of our present industrial system, such as statutes regulating hours of labor, work in tenements, workmen's compensation acts, etc. From the point of view of those keenly interested in such questions and coming in daily contact with the classes of the community practically affected by them, the effectiveness of such legislation often necessitates provisions which, to persons brought up under the economic and social philosophy of a few decades ago, appear unnecessary and arbitrary. Thus, much legislation which has been passed after years of effort on the part of those having special knowledge of existing conditions, and representing what to them, and indeed to the average man, is plain social justice, has appeared to some judges as unnecessary and arbitrary, and therefore has been held unconstitutional, under the due process of law clause in the constitution."[1]

If this is an important and fundamental problem, and the advocates of the recall seem to think it is, then the question is presented of the best method of its solution. Their remedy is to leave it to the people. Although it is so complicated and involves such a grasp of facts and conditions outside of the range of information of the courts and others not connected with the particular problem aimed at, their solution is to leave it to popular vote. This imputes an omnipotence to popular judgment on difficult questions of fact that baffles analysis. As against that, the suggestion of Professor Pound sounds sane, practical, and constructive. The establishment of an investigating bureau, manned with competent experts, and

[1] "New Method of Constitutional Amendment by Popular Vote," *Annals of the Am. Academy*, Vol. XLIII, p. 311.

subject to the order and directions of the court, which could make adequate investigation of all facts and conditions which the court deemed pertinent to the cases before it for decision, would be an actual contribution to the cause of judicial efficiency and social legislation, and thoroughly consistent with the best principles and traditions of our constitutional system. The relation of such a bureau to the court would not be unlike the relations existing between the masters in chancery and a court of equity. The special investigators sent out by various administrative commissions, whose reports afford the basis for the official action of the commission, is a development along the same line that has been of great value. As compared with this suggestion, the proposal for the recall of judicial decisions seems not only dangerous but futile.

The second basis upon which the defense of the recall of judicial decisions has been made to rest is the theory that the recall does not reverse the decision of the court but merely amends the constitution so as to make a specific exception of the law then before the court. It is argued that this is a more desirable method of amending the constitution since it can be restricted to the specific law involved, without abandoning the fundamental guarantee in so far as it may apply to other cases. In other words, the people are compelled to choose between abandoning the constitutional provision or the statute, whereas under the doctrine of the recall, they could retain the general constitutional guarantee, and merely engraft an exception to it in favor of the proposed statute.

Professor Lewis is afraid that unless some such measure is provided the people may be tempted to abandon certain very important constitutional restraints, in their desire to gain certain types of legislative relief. "It

takes no prophet," observes Professor Lewis, "to foretell that, with the prevailing desire for legislation which will correct some of the more obvious defects of our social and economic system, if the courts of a state are out of sympathy with such legislation, it will not be long before, by successive amendments, the due process of law clause of the constitution of the state will be practically abrogated. If no other system be provided, the present method of constitutional amendment, while permitting the people ultimately to express their desires in the constitutions, will, in the necessarily short statement of specific amendments, endanger other constitutional guarantees of their liberties which all consider essential to retain.

"The advantages of Colonel Roosevelt's suggestion as applied to such instances as those referred to are obvious. He provides, it will be observed, a method of obtaining legislation which does correspond to the prevailing ideas of fairness and social justice, while at the same time retaining in our constitutions the principle that no act which is arbitrary or unfair should be recognized as law."[1]

At first sight this seems a very attractive program. It is not revolutionary or radical, and is apparently constructive. But a closer analysis of its actual operation will show that it has certain inherent difficulties that are fatal to its efficiency, both as a constructive measure and as a practical instrument of popular control. The first objection is the constitutional rigidity given to any statute which the people may adopt as an exception to the constitutional provision that the court has held to have been violated by the act. For by making the law an exception to the Constitution, it is engrafted on the Constitution, and is then beyond the range of legislative action. By this process ordinary measures of legislation, which gen-

[1] *Ibid.*

erally require to be changed in their details from year to year, as new experience exposes defects in the details or principles of the law, is placed beyond the reach of ordinary legislative action. This cannot be said to be a wholesome thing for social legislation, although it is for the protection of such laws that the recall is being urged.

Mr. Charles H. Hamill gives an excellent statement of this objection. "The theory of a written constitution is that it embodies certain general fundamental and enduring principles essential to liberty and creates a machinery of government for their maintenance. With changing economic conditions come inevitably changes in current economic thought, which naturally tends to express itself in law. If shifting theories are to be embodied not in plastic statutory law, but in rigid constitutional law, not only will there be an abrupt departure from the theory of the written constitution, but we shall have entered upon a work of endless confusion. An elaborate employers' liability act, for instance, is made a part of the constitution; not only its general principles, but all its details, are endowed with constitutional vigor. After a few months' experiment one of its provisions proves unwise, or perhaps in conflict with another provison. The constitution must be amended! What was wanted was more flexibility; the result, more rigidity! It would not be many years before a state constitution would look like a crazy quilt, nor many more before parts of it would be no more useful or ornamental than the lithograph of a defeated candidate the day after election."[1]

The second objection to the theory of specific amendment is that it submits constitutional matters to popular determination under circumstances that are not conducive to the best formulation of the calm, temperate, and un-

[1] "Constitutional Chaos," in *Forum*, Vol. XLVIII, p. 45.

biased judgment of the electorate. When a general principle is submitted without regard to any particular situation, the judgment is more impersonal and sound. But when the principle is involved in some striking relation to a concrete incident, particularly if the incident be one that may arouse the passions or prejudice, a less mature and deliberate decision will result. The action of the people of Switzerland in voting for the prohibition of kosher beef is a case in point. Had the general principle of religious liberty been raised, with no special reference to any specific group, the vote undoubtedly would have been in favor of liberty.

"All agree," observes Mr. Hamill, "that there is no more valuable right than that of religious liberty. If the people of any state in the Union today were called upon to vote 'yes' or 'no' upon the adoption of a religious liberty plank to their constitution, if it had none, they could safely be counted upon to give an overwhelming affirmative vote. But suppose there should be submitted to the people the question of whether some one particular religious sect should have freedom of worship, would the vote be so overwhelmingly affirmative? The intelligence of our people and their interest in its general application may be relied on to support the proposition that no man shall be deprived of life, liberty or property without due process of law; but could their negative vote be so confidently counted upon if there were a proposal to take the property of one unpopular corporation and devote it to an unquestioned public good? Every man will vote 'no' to the proposition that the constitution shall be so formulated that his property or liberty may possibly be taken without due process of law, but would the same man so surely vote to support a decision of the Supreme Court holding void an act requiring a Stock

Yards Company without compensation to convert a section from the middle of its yards into a playground for the children of that congested neighborhood?

"When general propositions affecting all men alike are submitted to our vote, we are impelled by a combination of patriotism and fairness, with self-interest, to declare in favor of that which makes for righteousness; but it would be a most dangerous expedient to remove from the control of men trained by tradition and experience to weigh the rights of others and submit to a general vote, perhaps in time of great popular excitement and prejudice, the rights of a small group of men whose interests might, for the time being, seem opposed to the welfare of the community at large."[1]

Perhaps this is the place for a constructive suggestion that the author believes will very materially aid in avoiding many of the judicial vetos that have aroused so much complaint and that have undoubtedly done occasional harm. Many of the laws held void, might have been upheld by the courts, had they been properly drafted, with a due regard to the evils to be remedied and the constitutional provisions that were involved. Much abuse and criticism have been given to the courts that should go to those responsible for the framing of the laws. A striking example is afforded by the case of Bonnett v. Vallier.[2] Here the legislature enacted a tenement house law applying alike to all the towns, villages, and cities of the state. The law was apparently drawn with regard only to the needs of a large city, and provided among other things for modern plumbing appliances, which on account of lack of water and sewerage in some portions of the state would make compliance with it impossible. In holding

[1] *Ibid.*
[2] 136 Wis., p. 193.

the law void because it amounted to a prohibition of the construction and enjoyment of tenement houses and exceeded in other ways the limits of reasonableness, the court said, "The most striking general feature which challenges our attention is that it applies to every part of the state, country districts, small cities and villages—every portion is subject to the same degree of regulation as the city of Milwaukee, notwithstanding the obvious fact * * * that the conditions calling for such interference are so widely different that it would seem need for classification would have occurred to the legislative mind at once, in dealing with the matter, especially in view of the requirements which are entirely unsuitable to locations where water and sewer systems do not exist, and that calls for an expensive grade of buildings common to large cities, but which no prudent man would seriously think of erecting in some situations unless he could afford and desired to devote his means to charitable uses. * * * It is impracticable in the extreme, impossible would probably not be too strong a term to use, to comply with such requirements in many, even most, portions of the state. The result is, that, except within a very limited area, the construction and enjoyment of even the most insignificant kind of tenement houses is, in effect, prohibited by law."

The court has been severely condemned for this decision, but it is difficult to find a sound basis for criticism when all the facts are taken into consideration. This miscarriage of justice, if such it be, is to be laid at the doors of those responsible for the law. It was not drafted to meet the particular situation and conditions. Consequently, its practical result was a prohibition and not a regulation.

Colonel Roosevelt has given another illustration of a criticism of the courts when it was a legislative defect

that was to blame. "When I was President," he declared, "we passed a National Workmen's Compensation Act. Under it a railway man named Howard, I think, was killed in Tennessee, and his widow sued for damages. Congress had done all it could to provide the right, but the Court stepped in and decreed that Congress had failed. Three of the judges took the extreme position that there was no way in which Congress could act to secure the helpless widow and children against suffering, and that the man's blood and the blood of all similar men when spilled should forever cry aloud in vain for justice. This seems a strong statement, but it is far less strong than the actual facts; and I have difficulty in making the statement with any degree of moderation."[1]

The facts are that Congress had not "done all that it could," for the decision criticized[2] held the law was void because Congress had not confined it to employees actually engaged in interstate commerce, a precaution that those responsible for the law should have taken. In 1908 Congress enacted a similar measure, this time limiting it to the employees actually so engaged, and thus avoiding a fatal infringement upon the constitutional prerogative of the states.[3] The equipment of deliberative bodies with legislative reference libraries and efficient legislative draughtsmen, who can see that laws are drafted with due regard to constitutional requirements, will be a great constructive aid. If those responsible for constructive legislation will seek to get a sympathetic understanding of the purpose, the value, and the fundamental importance of these constitutional restraints, and if they will see to it that their programs of legislation go no farther than their scientific investigations show the way, they will

[1] "Charter of Democracy," in *Outlook*, Vol. 100, p. 390.
[2] Employers Liability Cases, 207 U. S., p. 463.
[3] *Pederson v. Del., Lack. & Wes. Ry.*, 229 U. S., p. 146.

encounter few difficulties to any program of genuine reform. "Constitutional rights need not bar the pathway of social reform. Properly understood they serve as guide-posts, directing reform along legitimate and consistent channels, and exacting at each turn, the test of scientific efficiency. If this be true, may it not now be said that the framers of the constitutional guarantees builded even more wisely than they knew?"

We have found that the recall of judicial decisions rested upon two fundamental propositions, the first that the true meaning of due process of law was determined by the preponderant opinion of the people, and secondly that a method of specific amendment to the Constitution was preferable and more elastic than the older and established methods. The first proposition was not valid because it was not a correct statement of the principle of constitutional law involved, because it was absolutely inconsistent with the doctrine of constitutional restraints and judicial review of which due process was a component part, and because it facilitated rather than impeded the invasion of fundamental private rights by the majority. The real difficulty in most of the cases cited involved a complicated question of fact rather than a general principle of public policy, and it seemed that such a question could be much better determined by a court, aided, perhaps, by a special bureau, than by a vote of the people who were in no position to know the facts.

The proposed method of specific amendment seemed impractical and undesirable since it involved making the statute a part of the constitution, thus placing it beyond the reach of that easy amendment and change which is so essential to the development and perfection of a legislative policy. Moreover, it involved the application of public opinion to fundamental principle under conditions that

tend to warp and bias the popular judgment. Most of the evils that were aimed at will disappear if scientific methods of legislation are employed, and the judgment of the court is supplemented by the work of competent experts in providing an accurate statement of the material facts and conditions of modern life, to which the judiciary will apply the fundamental principles of law.

SUGGESTIVE QUESTIONS FOR

CHAPTER VIII

I. If the test of what constitutes due process of law be the "preponderant opinion of the people," why was its determination ever left to the judiciary? Is not Congress in a much better position to judge as to what the preponderant opinion of the people may demand?

II. Is the "preponderant opinion" theory of the meaning of due process of law consistent with the doctrine of constitutional restraints?

III. Is it consistent with the doctrine of judicial review?

IV. Regardless of whether the "preponderant opinion" theory be historically the correct one, would it be a wise one to adopt now?

V. If the "preponderant opinion" theory be historically correct, then what was to be gained by placing the due process clause in the Constitution?

VI. Explain how the constitutional validity of laws may be dependent upon questions of fact.

VII. Is it possible to have a public opinion upon such a question of fact as is referred to in the preceding question?

VIII. Is the recall of judicial decisions inconsistent with the theory of constitutional restraints?

IX. How could better bill drafting remedy some of the evils complained of by the advocates of the recall?

X. Why should the recall be limited to cases involving due process and the police power?

CHAPTER IX

THE RECALL OF PUBLIC OFFICERS

THE demand for the recall of public officers is the result of the same general spirit of discontent with the operations of representative government that found expression in the movement for the initiative and referendum. The feeling among the leaders of the propaganda for the recall seemed to be that official conduct was too frequently corrupt or illegal, unrepresentative in character, or inefficient in performance. It was obvious that officers guilty of such conduct should not be continued in power. They, therefore, sought to provide the method by which the public could retrieve, in "firing" incompetent officers, the mistakes they had made in hiring them. It apparently never occurred to the proponents of this scheme that some of the difficulties encountered were possibly the result of the wrong methods of hiring, and that the utilization of the same methods of "firing" could hardly be expected to give greatly improved results.

The recall of public officers as it has developed in America is a simple device by which a given percentage of the voters (varying from twenty-five to sixty per cent.) may, by signing a petition which alleges the reasons for the action, compel a public officer to come up for reëlection. Other candidates may be nominated by petition to run against him. If he does not receive a plurality (or a majority of the votes cast, depending upon the particular law), he is recalled and forfeits the office. This device has been applied to both state and local elective offices in some states and in a few cases to appointive

offices. It is therefore part of the general movements to apply indiscriminatingly the methods of direct democracy to cure the evils of popular government. In general, it cannot be said to be a very grave departure from the principles of government already established in the states, for now most state and local election officers are chosen for short terms, at the termination of which they come up automatically for popular approval, if they desire to continue in power. The only change is the petition, by which a specified number of the voters may force an election before the expiration of the stipulated term.

Thus it appears that the underlying hypothesis of the recall of officers is that present methods of popular election are satisfactory, and all that we need is to give to the electorate larger and fuller power in the termination of the official relation. But "As a matter of record," writes Professor Beard, "the theory of popular control through a multiplicity of elective offices does not work in practice. In the case of a large number of officers there is no question of policy involved, because their functions are purely ministerial, prescribed by statutes, and their discharge of these functions is enforceable through the ordinary processes of law. No one has been able to discover up to this time why we should select a Republican state treasurer to serve with a Socialist state veterinarian; and it is because the results of state elections, so far as most of the offices are concerned, are of slight importance to anybody except the political experts, that the public is largely indifferent to the qualifications of the minor candidates. The real failure of the democratic theory, however, is due to the fact that it is absolutely impossible to discriminate wisely among candidates for a large number of offices. It is a matter of common knowledge that in almost every state election the only

candidates who are seriously discussed in the press—in other words, the only candidates upon whose qualifications and record any light is thrown—are those seeking the office of governor, and, in the case of municipal elections, that of mayor. The candidates for the minor state offices, and, what is infinitely more important, the candidates for the city council and the legislature, are generally left in the same fog which envelopes the candidates for the position of coroner or clerk of the municipal district court. There are of course exceptions to this rule, but it applies quite generally throughout the United States.

"Now to suppose that adding a system of recall to such a complex of public offices—already so large as to bewilder the voter—will advance public control over administration, is surely flying in the fact of what may be reasonably called the plain teachings of American political experience. It seems useless to expect popular control through the recall when the inevitable development of political machines has defeated popular control in the selection of officers."[1]

The specific question presented by the recall proposal is the efficiency of public opinion, when invoked by the petition, to pass an intelligent judgment upon the issues raised in the petition and in the recall election, which will generally have to do with one or more of three questions as follows: Has the officer been honest and acted according to the law? Has he misrepresented his constituents? Has he been an efficient officer? Obviously an intelligent conclusion can be formed only after a careful analysis of the three kinds of questions upon which public opinion will be asked to pass, a consideration of the various types of officers to which it will be applied, the prob-

[1] Beard and Schultz, *Documents on the Initiative and Referendum*, p. 53-54.

able actual operation of the petition, and a study of the alternative methods of terminating the official relation.

We will first consider the various types of officers to which the recall may be conceivably applied, and they are three in number. The first type we will designate as those purely political; that is, those officers whose main function is to determine public policy, such as members of the state legislature or city council. The second type may be described as quasi-political; that is, partly policy determining and partly administrative, such as the governor or mayor. The relation of chief executives to legislative policy and their position as party leaders, makes them to a large extent policy determining officers, although they may be vested with large administrative powers.

The third type is composed of the technical or purely administrative officers, who have relatively little to do with the determination of general policies, but whose main function is the performance of administrative duties, the discharge of which generally requires special skill, training, or experience. Accountants, chemists, bookkeepers, commissioners, health officers, comptrollers, engineers, and similar officials are examples of this type. It would seem rather obvious that the application of the recall to a member of the legislature might be more appropriate than its application to the state bacteriologist or statistician. Surely the conduct of the former is much more likely to come within the range of possible public opinion, with its inherent limitations, than the official duties of the latter. For that reason any intelligent discussion of the problem should proceed upon the basis of some such classification of officers as is here suggested.

So far nothing has been said about the position of the judge. There are several factors here that make his classification exceedingly difficult, and that entitle him to

special consideration in the discussion of the recall. To a certain extent the courts are policy determining officers. "Judges in the United States," declares Professor Beard, "unlike the judges of England for instance, are not restricted merely to the settlement of disputes between private parties; they are policy-determining officers, because they have the power to declare null and void, on principles of constitutional law which are scarcely more than general moral precepts, acts passed by legislatures and by the initiative and referendum. During the period of seven years from 1902 to 1908 the supreme courts of the several states declared unconstitutional about five hundred statutes. The theory upon which they act, of course, is that in declaring a law invalid they are merely interpreting the higher law or the supreme will of the people as expressed in the state or federal Constitution."[1]

In so far as the courts have occasion to interpret such general provisions as "due process of law" where the indefiniteness of its meaning makes it impossible to confine judicial action within boundaries definitely fixed by legal logic and the rule of precedent, the court is exercising policy determining functions, but within much more definite limitations than those that prevail in the exercise of legislative discretion. For there are precedents and principles for their guidance, although more vague and uncertain than in many other fields of law, and the limitations of a "sound judicial discretion" in which there is "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions" impose many and important restraints upon judicial action.

There is yet another respect in which a court has, within very narrow limits, a policy determining function. When matters come before the court in the ordinary

[1] *Ibid.*, p. 55.

course of litigation, which demand some form of legal redress, but where there is no statute, precedent, or custom that applies, the court may formulate a rule for the disposition of the case, thus creating a new principle of law. There are, however, so few cases of this character, that, as compared with the other functions of the judiciary, they may be regarded as negligible. On the other hand, the great bulk of judicial administration is concerned with applying the principles of law to the facts of each case coming before the court for decision, which is inherently a technical task and which involves no policy determining power. The successful performance of this task requires technical legal training and skill, a matter upon which a popular vote would be as impotent as it would be upon some problem of engineering technique. In the great majority of cases, therefore, the courts should be classed with technical officials.

The question remains, however, whether the court should be treated as a policy determining factor in regard to decisions upon the constitutional validity of legislation, when in conflict with the due process clause and similar provisions of the constitution, and whether, therefore, the court should be subject to the application of the recall. This raises the question, discussed in previous chapters, of constitutional restraints and judicial review. If the doctrine of constitutional restraints, as a protection to the rights of the individual and a safeguard against the hasty and passionate action of the majority, is sound, and if its maintenance is dependent upon the existence of an independent judiciary, the application of the recall of judicial officers would seem unsound. In fact, the argument of many of those who advocate the extension of the recall to the courts is that it will be an effective instrument to prevent the courts from exercising

the right of judicial veto upon popular or legislative measures. In other words, if the people of a state, aroused by the passions of war, desire to curtail the liberties of speech in behalf of the national cause, the recall would be the instrument by which they would prevent the judiciary from safeguarding the constitutional rights thus invaded, or through which they would punish the court in case it performed its legal duties. If the people of a state, aroused by a spirit of racial hatred, should seek, through the forms of law, as they frequently have done, to deny to the members of a given race those ordinary rights of liberty and property which are decreed by the most elemental conception of justice and decency, and the court should seek to extend to the despised race the protection guaranteed by the fundamental law, the recall would be the instrument by which the people could find a way of giving to their tyranny the effectiveness of law. To the extent, therefore, that the people would use the recall to prevent courts from exercising their prerogative of judicial review, it would tend to diminish the degree of protection to the individual now afforded by our constitutional system. It would not abolish it, but only weaken its effectiveness, and one's judgment as to its wisdom in this particular case, would be determined, therefore, by the degree of importance one attaches to the preservation of these rights.

We come now to the consideration of the efficiency of public opinion, operating directly through the recall, in determining whether or not the particular officer, against whom the petition has been filed, should be recalled. An officer might be recalled for any one or more of the three following reasons: Corrupt or illegal conduct, misrepresentation of his constituents, or official incompetence.

It will be admitted that if an officer be corrupt or

guilty of illegal conduct, he should be removed. Every one would agree upon that as a matter of policy and a vote on that issue would be useless. But the question would remain as to whether or not the officer charged with corruptness or illegal conduct, as a matter of fact and law, had been guilty. There is nothing more difficult to determine than the corruption of official motives. Men who would be corrupt in official life ordinarily take every possible precaution to conceal every evidence of their crime. Our criminal courts and our prosecuting attorneys, with all their equipment for investigation and sifting of evidence, find the greatest difficulty in determining such intricate questions of fact. On the other hand, the bitterness of partisan strife, and the ill feelings frequently and necessarily engendered in official conduct which disappoints citizens whose interests are thereby affected, make it quite possible that charges will be lightly made. If a petition is filed charging corrupt conduct against an officer, under this circumstance, the truth or falsity of the charge is not to be investigated in open court, before a jury sworn to decide the case according to the law and evidence, under the guidance of a judge, and where witnesses may be examined and cross-examined, and truth sifted out from error. Instead the proposal is to leave the question of fact thus raised to the determination of a public vote, in which it will be determined by people who know nothing of the evidence, most of whom know nothing of the parties that are involved, and where no provision is made for a sifting of the facts and a careful determination of the issue. It is needless to say that in such a case there can not possibly be anything that even remotely resembles public opinion. For no fundamental convictions are involved, and the average voter will not be sufficiently informed upon

the facts to come to any intelligent decision. This means that the vote will be determined by those accidental factors which sway men's judgment when they have no basis for a rational conclusion. Those who control the press, or who can secure the most convincing and persuasive orators, or who are in command of the most effective organization of the voters, will have great influence in the decision of the issue. It will be a contest determined by the accidents of politics, rather than the discovery of the truth.

The injustice as well as the inefficiency of this method of deciding the difficult problem of fact, presented by a recall election which turns upon alleged corruption, is forcefully stated by Mr. William B. Hornblower. "When we come to the question of corruption, the injustice of having such charges passed upon by popular vote after a heated campaign with violent harangues by popular orators without any legal proof of the charges is manifest. To have the honesty or dishonesty of a judge determined by the effect of stump speeches upon the platform, by loose declamations and unsworn statements of interested parties without any opportunity for careful examination, is to subject a judge to an indignity and a possible injustice which may blast his reputation for a lifetime. How often have we heard disgruntled clients, or even indignant lawyers, complain that a judge has been bought or improperly influenced to render adverse decisions when we are confident that such charges are absolutely unfounded, and are the product of an over-heated imagination resulting from the bitterness of defeat in a hard-fought litigation."[1]

On the other hand, Mr. James Manahan is equally

[1] "Independence of the Judiciary the Safeguard of Free Institutions," in *Yale Law Journal*, Vol. XXII, p. 1.

sure that injustice never will be done. "The recall never has wronged and never could and never would destroy a just judge; it is the shield of good judges, protecting them from the importunity of special and corrupting influences and securing them in the affection and love of the people, for whose general welfare they should labor; it is and could be a weapon only to use against unfaithful judges and I ask, should not unfaithful public servants be scourged from the temple of justice sternly and with promptitude?"[1]

The only ground upon which this sweeping assertion can rest are the timeworn assumptions of the omnipotence of the public, and that the people, speaking through the recall election, will unerringly proclaim the truth, regardless of circumstances. Obviously no method will always secure the truth in determining a controverted and difficult question of fact. Our concern here is to determine whether a recall election is the most efficient means available for the determination of such questions. For centuries civilization has struggled with this important problem. What method of determining the guilt and innocence of those accused will most likely produce the truth and win the confidence of the public? The unanimous verdict of experience is that some form of judicial process will give the best results. Then we may well inquire of the advocates of the recall, if one is to be removed because of alleged corruption, why not make the determination of that fundamental fact according to the best methods civilization has been able to mature, rather than to leave it to the vagaries of a popular election. For it is inconceivable that any one would argue that in the determination of an alleged but controverted fact, not lying within the range of ordinary observation and general experience,

[1] "Recall of Judges," in *Minneapolis Tribune*, Feb. 21, 1913.

such as the allegation that a certain legislator had received a bribe for voting on a particular bill, the electorate would be an able and efficient judge.

To this it may be answered that the recall will not be used to determine questions of fact. This seems to be the impression of Mr. H. S. Gilbertson, who observed that "In none of the cases in which it has been invoked does there appear to have been any effort to bring to light the definite evidence of malfeasance under the statutory definitions, which would support legal indictment. If such evidence existed in the mayoralty cases in Los Angeles and Seattle, no effort was made to formulate it. And in all the others the action for removal was put entirely upon grounds of public expediency."[1]

On the other hand, the advocates of the recall are continually urging it as a means of removing officers because of their corrupt and illegal acts. Moreover, Professor James D. Barnett, writing in 1915, gave a survey of the seventeen recall elections that had then been held in Oregon, and it appears that in at least six out of the seventeen, the petitions alleged fraud, corruption, or some other illegal act, the proper termination of which would have involved a delicate question of fact or of fact and law.[2]

It may be argued that since one can not be recalled without a petition bearing a large percentage of names, that this petition affords a sufficient guarantee against charges of corruption unless there is real evidence of the truth of the assertion. But the evidence is that many persons sign the petitions in utter ignorance of their contents and without interest in the results. Professor Barnett re-

[1] "Recall—Its Provisions and Significance," in *Annals of the American Academy*, Vol. XLIII, p. 216.

[2] *The Operation of the Initiative, Referendum and Recall in Oregon*, pp. 191-201.

ports that "Although it is probably true that people do not sign recall petitions thrust before them on the streets and elsewhere as readily as they do other kinds of petitions, nevertheless under the present system there is great probability that accommodating persons will by their signatures aid a movement for the merits of which they care absolutely nothing."[1] Nor is there any reason for thinking that merely because one knowingly signs such a petition he has made such a careful investigation of all the facts and evidence that he would be justified in certifying to the accuracy of the allegations made. In fact, the general theory seems to be, not that the signer of the petition knows it to contain the truth, but merely that he has a suspicion or doubt which he thinks ought to be submitted to a trial of votes.

Perhaps one of the most significant matters in connection with the petitions is the fact that very commonly they do not state the real motives of those who have furnished the money and the energy to secure the petition and to make the fight against the officer. In Professor Barnett's survey of the seventeen recall elections in Oregon, above referred to, he finds that in a majority of the cases there were other motives than those alleged in the petition, and that in some cases these ulterior motives were the dominant ones. Where people with sufficient funds, influence, or energy, were motivated by spite or other ignoble feeling against an official, which they dared not assign in their petition, they assigned plausible motives for their action in the petition, and fought the officer behind a smoke screen of misrepresentation. The obvious unfairness and injustice of these methods needs no discussion. While this did not always happen, it was common enough to be regarded as one of the ordinary abuses.

[1] "Operation of the Recall in Oregon," in *American Political Science Review*, Vol. VI, pp. 41.

Professor Barnett gives a condensed account of some of these cases which deserves serious attention. "Neither in the cases in which the officers were recalled nor in that in which the officer was sustained in the election do the reasons for the demand as stated in the recall petitions disclose all the motives nor always the chief motive for the demand. In one case where it was charged in the petition that the officer was inefficient, immoral, untruthful, and arbitrary in the exercise of his authority, a motive which was influential at least to some extent was the hostility of certain property owners caused by the officer's action in opening streets which they had illegally closed. In one of the bitterest campaigns the petition asserted that the officials had managed the affairs of the city in an unsatisfactory manner, illegally diverted public funds, repudiated the city debt, etc. But the real cause of the recall movement was simply a factional fight waged by two banks and their respective supporters which had divided the city against itself ever since the second bank was organized, and which ceased later only with the merger of the two banks. When the petition charged a mayor with incompetency, improper expenditure for street improvements, unwarranted removal of a city employee, and favoritism in committee appointments, the real ground of the agitation seems to have been opposition to his progressive policy in regard to public improvements. Where the petition stated simply that a councilman did not 'faithfully and efficiently represent' the interests of his ward and city, the motives behind the recall were various. The officer had been inconsiderate in dealing with some of his constituents who desired his influence in securing certain action by the council. He had fathered an ordinance deemed by the labor unions prejudicial to their interests, and he was opposed by their

adherents on this account. Their candidate won in the recall election. Further, the councilman had advocated the location of a sewer outlet in a certain locality and had thus aroused the opposition of some property owners. One of these was a candidate at the recall election. The councilman had also incurred the enmity of a corporation attorney by charging the latter with an attempt to bribe him to drop some legislation detrimental to the interests of the company. The attorney was very active against the officer in the recall campaign. It was also claimed that several corporations which had suffered from legislation originating with this officer were partly responsible for his defeat. In another case where unsatisfactory administration, diversion of public funds, needless expenditures, abuse of the emergency clause in the enactment of ordinances, impairment of the public credit, etc., were alleged in the petition as the reasons for demanding the recall, the movement was really the outcome of struggle between those who opposed and those who favored the stringent enforcement of the prohibition law. The officers attacked represented the 'temperance' ticket which had won at the previous election.

"It appears that some of the charges stated in the petitions in these cases could be substantiated but that others could not. On the whole, it seems that the recall action was not justified in more than one or two of these cases. However, it is going too far to conclude, as has been maintained here to some extent, that this experience with the recall has shown it to be merely an instrument of personal or factional spite."[1]

Whatever may be said for the recall in some of its other uses, there seems no reason to regard it as a particularly effective instrument for the determination of the

[1] *Ibid.*

guilt or innocence of an officer accused in the petition of corrupt or illegal conduct, since there is no ground whatsoever to suppose that there will be any reasonable relation between the popular verdict and the guilt or innocence of the man. Clearly some form of judicial process would be infinitely more reliable in the just and accurate solution of this type of problem. In view of these facts the following indictment, by Mr. James A. Tawney, against the use of the recall as a means of removing officers for alleged corruption, does not seem overdrawn. "Under this system, it will be seen, therefore, that the misguided or malignant passions of an unimportant part of the community may accuse the most efficient elective officer, and by the use of groundless charges or published misrepresentations, create suspicion and distrust where formerly public confidence and faith existed; thus depriving the state of the services of an efficient and an upright executive officer or stainless judge. The recall is in the nature of a public indictment, returned, not upon evidence, but upon the will or the caprice of those who frame and sign it, charging no offense moral or legal; presented to a court that is bound by no rules except the rule of the majority; where the defendant is denied all presumptions in his favor and where he cannot answer any specific charge, for no specific charge is necessary to secure his conviction."[1]

The efficiency of the recall as an instrument of removing those officers who fail to represent their constituents, presents a different question. In so far as technical officers are concerned, there is generally supposed to be little occasion for the exercise of popular control for this purpose, since such officers are not in control of policies and can hardly be said to misrepresent their constituents,

[1] Edith M. Phelps, *Selected Articles on the Recall*, pp. 46-47.

unless they are either incompetent or corrupt, which raises an entirely different set of questions. For example, a state statistician could hardly be guilty of misrepresenting his constituents, so long as he was competent and honest. There are no Democratic, or Republican, or Socialist policies involved in his technical duties. The same is true of the state bacteriologist, engineer, geologist, comptroller, and the various other officers whose duties are essentially technical and administrative. While it is true that the recall does not frequently extend to other than elective offices, it is done occasionally, and in practically every state and city there are some technical officers that are popularly elected. It would seem, therefore, that a discriminating and intelligent use of the recall would have to be restricted to political officers, unless one be of the opinion that it is also useful as a means of applying standards of technical efficiency, a suggestion that will be discussed later.

As applied to political or quasi-political officers, the recall election should afford, in a small number of cases, a reasonably satisfactory method of removing those who fail to represent the opinion of the public. If the mayor, for instance, declines to enforce the law and runs a "wide open town," a recall election based upon that allegation should register accurately the public opinion of the community. And such an issue is one upon which a public opinion would very probably exist. If a member of the legislature is too conservative, or too wet, or too radical, a recall election on such an issue presents an opportunity for the public opinion of the community to express itself. These are obviously the most simple questions that could arise, and are, therefore, the best illustrations to demonstrate the strong points of the system. For it is equally apparent that many issues could come up, in-

volving the political action of these officers, which would present technical questions of policy, upon which public opinion could not pass directly, but where it could function intelligently only after the law had been in operation long enough to show by its results whether it secured the objects in which the constituents are interested. But this will be discussed later. Enough has been said, however, to show that even here the recall is not an unmixed blessing.

The strongest argument for the recall, therefore, does not seem to lie in its inherent efficiency, but rather in the opportunity that it will afford to lengthen the term of office, thus securing to the public the benefits of official experience and training that comes only with longer terms of service. For it will probably be very unlikely that the people will greatly extend the official terms of political officers, unless the extension is accompanied by the recall. "That longer terms of office and a freer range of discretion are conducive to administrative efficiency is everywhere accepted," writes Professor Beard, "and the recall seems to offer to democracy the proper safeguards against the usurpation which will warrant the granting of longer terms and larger powers to executive authorities."

But even this beneficent result can be attained only when some of the present problems of the recall have been more nearly solved. There must be new safeguards regarding the use of the petition and some form of legal responsibility attached to those responsible for the good faith of the allegations that it contains. It is intolerable that it should be employed as an instrument of personal or political spite, and that the petition should allege one thing while the secret efforts of organized forces are waging their fight on a totally different issue. Whether or not these abuses can be adequately dealt with, time

alone will tell, but until they are, the wisdom of the device, even for the reasons here suggested, will be doubtful.

There is one other aspect of this situation that requires discussion. Even though it be granted that the recall will accurately determine whether or not any particular officer is truly representing the opinion of his constituents, there are those who think that it would be much wiser not to allow the public to voice its opinion at any particular moment when it may feel disposed, but only at stated periods and after enough time has elapsed so that the opinion will be the mature opinion, resulting from a long period of deliberation, and not the snap judgment of the moment, induced, perhaps, by some unusual stress or excitement. For this reason it is argued that regular elections, occurring at stated periods, provides conditions that tend to secure an expression of opinion that in the long run will be most reliable and sound. Under such a system, the people may have to endure officers for a time that they do not like, but it is argued that such a disadvantage will be more than offset by the other considerations just mentioned.

For instance it is argued, that at the time Washington resisted the popular clamor to form an alliance with France, he would have been recalled, had it been possible, but that by the time the people had had an opportunity to think it over and mature their opinions, they were convinced of the statesmanship of the policy. Governor Samuel W. McCall thinks the same situation existed in regard to Lincoln. "The disastrous defeats that the Union arms had suffered had been relieved only by slight successes. Lincoln scarcely had a friend even in his own Cabinet. Seward was willing to take him under guardianship and run the country for him; Stanton had written

of the 'imbecility' of the administration; Chase was quite ready to be a candidate for the Presidency himself; the abolitionists were unsparing in their criticism; the great organs of public opinion were hostile to him; and there can be little doubt that, if a proceeding for Recall could have been had against him at the moment when he was enveloped in the clouds of unpopularity, the career of the greatest of Americans would have been brought to a disgraceful ending, with results to civilization which it is melancholy to contemplate."[1]

This theory has been very excellently stated by President Hadley in the following paragraphs: "The work of governing a commonwealth—nation, state, or city—is a complicated and difficult piece of business. It never goes wholly right. The statesman must sacrifice some things which he regards as highly desirable in order to secure other things which he deems fundamentally essential. He alone knows how necessary the sacrifice is and how much he himself regrets it. The man who looks on from outside thinks that the statesman is doing it lightly. Such a man sees the loss to the shipper from allowing an increased railroad rate. He does not see that he must let the railroad charge that rate in order to secure the necessary development of the transportation system of the community. He sees the loss from having American vessels pay tolls in the Panama Canal. He does not see the gain in foreign relations due to the adoption of an honorable policy. A journalist is tempted to make himself popular by voicing the complaints of his readers. By advocating a short-sighted policy which works for today only, he can make a profit for himself; and few of those who buy his paper, foresee the loss that comes

[1] "Representative as Against Direct Government," in *Atlantic Monthly*, Vol. 108, p. 454.

to the country if his advice is followed, or put the blame on his shoulders after it has come.

"This sort of captious criticism is one of the incidental evils which has attended government by discussion in all ages and in every state. 'Armies,' says Macaulay, 'have won victories under bad generals, but no army ever won a victory under a debating society.' Once let the officials of a democracy be placed at the mercy of a purely critical press, and the efficiency of American democracy —not to say American democracy itself—is at an end. It is this that makes the proposed institution of the recall so perilous. The recall is based on the theory that people should be encouraged to judge of a man's work when it is half done. On terms like these efficient and farsighted administration is impossible. The recall may seem to be justified in a few cases where an official has palpably betrayed his trust without quite rendering himself liable to impeachment, but for one case of that kind where it does good there are likely to be a dozen cases where it will prevent an official from assuming the sacrifices and incurring the odium which any farsighted plan of government is apt to involve before its results are understood.

"Most of the public discussion of the recall has centered about the recall of judges. We are told that the judicial office is something apart by itself, and that there are special dangers which make the recall inapplicable in this particular instance. I believe that this distinction between the recall of judges and the recall of other officials is an essentially false one; that every official should be allowed to serve out his term, except in case of misconduct or incapacity; and that the nation which claims the right to change its mind as to the fitness of an official during the middle of his term is proving its incapacity for democratic government. It is either unwilling to take

the proper care in the selection of officials or unable to have patience until the allotted work is done before passing judgment on its merits."[1]

It is this consideration that is generally urged in reply to the argument that if the people can elect, they can likewise remove. Undoubtedly any officer that it is wise for the people to elect, it may be equally wise for them to remove, but the advocates of this theory would limit the opportunities for removal to periodic, stipulated occasions in order that the vote might be as mature and deliberate as circumstances would permit. They argue that the best results will be secured by giving to the officer a term of office long enough to afford him an opportunity to show what he can do, and long enough to give the people a real opportunity to judge of his usefulness. This can only be done by a fixed term of office, while with the recall, an officer may be subjected to a recall election before the people have had adequate opportunity to form a mature and deliberate judgment regarding the officer that is recalled.

The success of the recall, as a means of determining the efficiency of officers, now remains to be considered. If an officer is inefficient, there is no doubt that he should forfeit his office. This will be admitted on every hand. Therefore the only thing to consider is whether the recall election affords a rational and effective means of determining whether or not an officer is efficient.

Unfortunately for the interests of clear thinking, most of the discussion regarding the merits of the recall has not proceeded upon this basis. It has generally been discussed in terms of democracy and of the rights of the public, rather than in terms of its peculiar adaptability to the specific tasks at hand. It has been glibly

[1] *Undercurrents in American Politics*, pp. 167-170.

compared with the right of the employer to discharge his employee, and from this sweeping generalization, its compliance with sound business principles has been eloquently implied. Mr. Jonathan Bourne naïvely observed that the "Adoption of the recall is nothing more than the application of good business principles to government affairs. Every wise employer reserved the right to discharge an employee whenever the service rendered is unsatisfactory. The right of the employer to discharge his employee rests upon exactly the same basis as the right of the employee to quit. The principle is recognized throughout the business world, and it is put in practice by every large and successful corporation."[1]

This astounding comparison deserves some consideration because it is so typical of those defending the recall. Of course it is the practice of modern business to provide for the discharge of inefficient employees, and it is equally clear that the public may very properly claim the same right in regard to public employment. Upon this there can be no debate. But what is the best way for the public to exercise that right? The implication is that they should do it much the same as it is done in modern business, and the further implication is that the recall provides that way. Now let us make a critical analysis of the comparison. When a great corporation desires to remove an employee because of his inefficiency, they do not wait for some stockholder to take the initiative and circulate a petition for the recall of that official, and then subject the question of the official's efficiency to a vote of all the stockholders. Such a proceeding would be grotesque and ridiculous, and for the very simple and obvious reason that the stockholders would know nothing of the

[1] "Functions of the Initiative, Referendum and Recall," in *Annals of the Am. Acad.*, Vol. XLIII, p. 3.

merits of the controversy thus submitted for their determination. Yet one might argue with a great show of moral indignation that the business belonged to the stockholders, that they had a right to run it, and that they were justified in protecting themselves against the evils of inefficient officers. This would not dispose of the fundamental question, however, as to whether that was the proper way to do it. In business every one knows that it is not. No one has ever suggested it. And yet one may safely assume that the average stockholder is as intelligent about the business in which his money is invested as he is in the government under which he lives. Moreover, he is probably just as interested in the efficient management of his business as he is in the efficient conduct of his government. Perhaps this is not as it should be, but it would take a blind optimist to assert the contrary. If the stockholders of a corporation have neither the interest nor information to make a discriminating and intelligent determination regarding the efficiency of their corporate officers and employees, then upon what basis is it argued that the voters of a republic will do better?

As a matter of fact the experience of business has shown that the wisest methods of procedure, in corporate undertakings, are just the opposite of the recall and the other instruments of direct democracy. The stockholders delegate all the powers of management, within the limits fixed by the articles of incorporation and the laws of the state, to a board of directors whom they elect. This board of directors generally elect the few chief officers of the corporation, and vests them with the complete authority over all questions of "hiring and firing," holding the officers accountable for the results achieved. This is analagous to the principle of the short

ballot as it is embodied in the federal government, where the people elect the President, who in turn appoints the cabinet, and leaves to the members of the latter the great task of appointing and removing subordinate officials, holding them answerable only for results. The theory here is very simple and is obvious common sense. The managers and departmental heads are the ones most closely in touch with the work of their departments and the efficiency of the various officers and employees, and they are, therefore, the ones most competent to pass an accurate judgment upon the efficiency of each employee and to know whether another can be secured who can do better. The trained executive is an expert in judging men and in measuring the services that they render. More than that, it is his business to know where the best men for the different tasks are obtainable, and the most effective methods of employment. Much scientific work has recently been done in the study and perfection of employment methods, and the only way the public can take advantage of this is to adopt the principles embodied in private business and in the federal government, and vest the power of "hiring and firing" in responsible officers with full authority, and then to hold them to strict accountability for the services they render.

Because of certain obvious differences between public and private business, one cannot press the analogies of private business too far. So far as private business has developed sound principles of administration, however, and correlated them with the necessity for responsibility to the body of stockholders, the analogy is not without great value. And to just this extent the experience of the business world, instead of affording evidence in favor of the recall as a sound principle of corporate organization, as is so frequently contended, affords the most con-

clusive evidence that we have against the value of the recall election as the most accurate method of determining the efficiency of employees.

Let us now analyze the specific problems that are involved. In applying the recall to technical officers, we have the problem of formulating the technical standards that should prevail, and the still more difficult and technical task of applying those standards to all the facts of the particular case. Suppose, for example, that criticism is made of the state bacteriologist, and a demand formulated for his removal. This will involve a determination of some reasonable standard of scientific efficiency in the field of bacteriology, the application of that standard to the training, conduct, and services of the particular officer, and an intelligent judgment as to whether another bacteriologist can be secured who will give a higher standard of technical service. The simple statement of the problem involved is enough to demonstrate conclusively the utter impossibility of supposing that, upon such a group of questions, a public opinion could possibly exist. It is likewise with the courts. Most of the business of the courts is the analysis of the facts of the various controversies coming before the courts for adjudication, the determination of the principles of law that are involved, and the application of the rules of law to the particular situation. This involves a technical knowledge of the law and a mastery of the processes of legal reasoning. If a judge is to be removed because of his alleged inefficiency, the removal power must be vested in some agency in a position to judge accurately as to the court's knowledge of law, and the scientific precision and accuracy with which it was applied in the given case. Here it is equally obvious that a public opinion could not exist, and therefore that a recall election as a means

of determining official inefficiency would be impotent, for as so frequently observed the mere counting of hands determines nothing unless it faithfully represents or articulates a real public opinion.

An attempt to subject Judge Coke, a district judge in Oregon, to a recall election, because it was alleged that he had given instructions in a sensational murder trial which improperly favored the defendant, illustrates the futility as well as the danger of trying to use the recall to determine matters of official efficiency. The following comments upon the situation thus produced, coming from a strong advocate of the recall, are particularly significant. "In reality it is not Judge Coke that the good people of Roseburg are after. Their real fury is against McClallen, but for the moment it is Judge Coke that is in sight. The public sympathizes with them in their indignation. McClallen shot down a highly esteemed citizen. He escaped punishment. The indignation of the Roseburg people is a natural sequence. But it was not Judge Coke that pulled the trigger of the murderous revolver. McClallen did that. It was not Judge Coke that fixed the requirements of the jury instructions at the trial. It was the law of the land that did that. Parts of the very instructions used were the dictum of the Oregon supreme court in the Morey case. On sober second thought, the Roseburg people must realize that fury is being visited on the wrong man. It was McClallen that killed a citizen. In a Portland case where the instructions on vital points were the same as Judge Coke's the jury convicted. Had the two cases been tried contemporaneously, would the friends in one instance have used the recall because one court convicted and used it in the other because there was an acquittal? * * * Under the recall, the people would place Judge Coke on trial.

They would also have to try the McClallen case in full. They would have to know all the facts in detail to pass an intelligent opinion. They would have to have the law points explained. They would have to hear the instructions. They would have to study the decisions and precedents. They would also have to try the supreme court of Oregon, for the supreme court, in the Morey case, affirmed, in effect, the vital instructions given by Judge Coke. They would have to pass on the question of whether the supreme court was right or wrong. In short, they would have to supersede the supreme court and perform the functions of super supreme justices. In exercising the recall in such an instance, the electors of the second district would, in effect, assume all the functions of one of the coördinate branches of the state government of Oregon, setting aside the judiciary for the moment and making each elector in the second district a super supreme judge, exercising power above the judiciary and above the constitution itself. * * * The people are not in position to pass upon the legal questions involved in the instructions to a jury. They cannot be constituted and do not want to be constituted a super supreme court, superseding and setting aside the constitutional supreme court. They are sane and sound in their judgments on ordinary issues, but they never have claimed nor ever will claim that they are all skilled in the law. * * * In the very nature of things, it is as the confusion of tongues at the Tower of Babel for an electorate of laymen to attempt determination of whether a judge is right or wrong on a legal question."[1]

The best that can be said for the recall as an accurate means of determining the efficiency of a technical official is that the people will have enough sanity and

[1] *Oregon Journal*, July 7, 13, June 19, Sept. 8, 1911.

judgment never to use it. It would be much safer, however, if it could be restricted in its operation so that it could not be invoked in this class of cases. For there is no disputing the fact that efficient officers may be subjected to the recall on such occasions, so long as it is open to use for such purposes, and particularly so long as officers are frequently called upon to make decisions that may arouse great public resentment and excitement, even though the decision be accurate and fair. This does not mean that there can be no public opinion in regard to technical service, but merely that in such cases public opinion cannot function directly in technical matters. It can, however, function indirectly by passing judgment upon the general results of the administration.

The author recalls an incident of twenty-five years ago when the State Board of Health of Indiana, because of certain primitive methods that children would indulge in, in cleaning their slates, issued an order prohibiting the use of slates in the public schools and explaining the theory upon which the order was given. At the time it aroused violent protest in many sections of the state. The press, in its efforts to discredit the board, designated its secretary as the "bughouse" man. If there had been a recall in existence, undoubtedly serious efforts would have been made to invoke it against the board that thus invaded the sacred rights of home rule, and imposed such unnecessary restrictions upon the innocent conduct of the pupils. The whole theory of bacteriology, which the Secretary of the Board of Health was then trying to popularize with the people, in the interest of their health and welfare, met with incredulity and hostility. A popular vote at that time upon the measure involved would have probably worked irretrievable loss to the best interests of the state. A few years

later, when the results of their program became apparent in the reduced amount of suffering and disease, the same program would have been enthusiastically endorsed. Herein lies an actual menace, and it would seem that a people would rule themselves more wisely if they so adapted their machinery of government that public opinion would have occasion only to pass upon the results of expert service, rather than upon its technical sufficiency. The recall inevitably tends to secure the latter and prevent the former.

In using the recall election to determine the efficiency of quasi-political or executive officers, we find some of the same difficulties. Obviously the efficiency of an administrator will depend largely upon the character, type, and technical efficiency of the men that he appoints and retains in service. We have already seen that upon such questions a public opinion is absolutely futile, and therefore, that a vote on such a matter might be vicious, but never constructive or intelligent. Public opinion can function in such a case only indirectly, by choosing the chief administrator and by judging of the results of his general administration. This is the system in vogue in the federal administration, and it is generally admitted by the students of our government that the reconciliation between administrative efficiency and amenability to popular control has been more nearly solved here than in any other part of our political experience. Moreover, it should be noticed that no one has ever seriously advocated that we should elect our cabinet members, to say nothing of subjecting them to the popular recall. It is, perhaps, even more significant that there have been few if any demands for the recall of the President, while there is a growing demand to lengthen the term and make him ineligible for reelection. These circumstances and

tendencies, together with the movement for the short ballot in state constitutions, would seem to indicate that the most efficient and the most truly democratic government would be that in which public opinion sought to function directly only in the choice of a few leaders, and measured their services by the results that they achieved.

The reliability of the recall election as a means of determining the efficiency of purely political officers presents a slightly different question, but one upon public opinion would be doubtful, if not impotent. Whether a member of the legislature is an efficient member depends upon many factors quite outside of the range of observation and knowledge of the average voter. The efficiency of such an officer will depend upon the quality of his committee work, his capacity to get on with his colleagues, the amount of study that he gives to his public duties, and his capacity to understand problems and to make real contributions to their solution. A legislative member may vote according to the wishes of the majority of his constituents, he may be present at roll calls, and formally comply with the official requirement of his office, but at the same time be a very inefficient member. He may shirk his committee work, decline to study public problems, give only a passing interest to the public business, have no influence with his colleagues, and yet give to the average voter of his district the impression that he is reasonably efficient. The elements that make for efficiency in legislative and similar work are so intangible and difficult to ascertain that a public opinion upon such matters could only exist, except in exceptional cases, after a considerable period had elapsed. It would seem, under these circumstances, that popular elections would not register a true or intelligent opinion upon the matter involved, except after

such an extended period of public service as would afford an opportunity to measure efficiency by results obtained. It would seem the part of wisdom, therefore, to submit such questions to the electorate only at such stated periods, and not at any moment that might be determined by those who could file the necessary papers.

From the foregoing discussion we may draw the conclusions that the efficiency of a recall election to determine the guilt or innocence of an officer accused of corrupt or illegal conduct, or of official inefficiency, is negligible, since in both classes of cases the determination would depend upon matters lying wholly outside the range of information and experience of the average voter. On the other hand, as a means of determining whether the political official is in harmony with the public opinion of the community, on questions upon which a public opinion may be said to exist, it may serve a very useful purpose. The difficulty would be to restrict its use to the limited class of cases in which it may prove useful. So far no efforts have been made in this direction.

Doubtless many of the advocates of the recall would answer that its real value consists not so much in the fact that the recall election will render accurate determinations upon the questions submitted, but that it will be an effective club hanging over the head of public officers—an ever present incentive to them to do their duty and thus to avoid the expense and danger of a recall election. How effective this potential threat will be will depend largely upon those who can most easily employ it. Too frequently it is tacitly assumed that only those members of society who are interested in honest, efficient, and public-spirited officers will avail themselves of the opportunity. To get a petition bearing from

twenty-five to sixty per cent. of the voters is, except perhaps in small communities, a gigantic undertaking. It is a task that will require organizing genius, publicity, money, time, and energy. The groups or individuals who can most easily command those resources will be the ones who will most easily secure the petitions and who will, therefore, wield the club. But it does not follow that those who wield the club will be those who will do it in the interests of the public.

We hear much about special interests in politics. By special interests we mean those who have a peculiarly selfish or sordid motive in seeking to influence or control the government. The reason for the great strength of the special interests is that with them politics is a business interest. They work at politics with the same zest, determination, and assiduity that they work at private business. Consequently they are organized for that purpose. With their organization, it would be much easier for them to secure the circulation of a petition, than it would be for a group of citizens whose only interest was the public weal, and who were not organized. In other words, the petition places a special premium upon those elements in politics most highly organized. Other things being equal, therefore, the special interests are the ones who may most easily and effectively wield the club that the recall provides. Of the seventeen cases of recall elections held in Oregon up to 1915, as described by Professor Barnett,[1] at least five of them were secured by persons who had an economic interest, although invariably the real reason was not disclosed in the petition. Moreover, these were all city or county elections, where the burden of getting a petition would not be so great. In a state

[1] *The Operation of the Initiative, Referendum and Recall in Oregon*, pp. 191-218.

election, where the obtaining of the signatures would be such a tremendous undertaking, the advantage it would thus give to the organized efforts of the special interests is obvious. It would be no great task for the wet interests, or for the public utilities of a state, through their organizations, to circulate a petition and secure the necessary names. But for those citizens whose only interest would be their devotion to the public welfare, such an undertaking would be almost impossible.

Having secured the petition, the interests who held it could place it in "cold storage," as a continuing threat against any act on the part of the officer that the holders of the petition would not approve. When one considers the cost and energy involved in an election, and when one remembers that one has little chance to have the merits of one's case thrashed out and decided according to its merits, the little group that "owns" a petition, charging an officer with improper conduct, and prepared to wage an effective campaign against him in case of an election, is vested with a power that is as great as it is tyrannical. He must either acquiesce in the demand of the little group, or submit his case to the determination of voters who know nothing about it, with the painful realization that the organized forces of publicity are against him. This evil could be partially remedied by amendments to the law providing that petitions should be filed within a specified time after the signatures are received, but no such amendments have been made, although the holding of petitions in "cold storage" has occasionally occurred. Evidence is not wanting that those who have circulated petitions in regard to the referendum have dropped the petition upon the payment of a stipulated sum.[1] The same abuse is obviously possible

[1] *Ibid.*, p. 68.

in connection with the recall, and is simply additional evidence of the dangerous power the recall places in the hands of those organized interests who can easily secure the necessary signatures.

One vital consideration to be noted here is the effect the recall will have upon the type of men attracted to public office. One of the greatest tasks that confronts modern governments is the development of a highly efficient administration, competent to grapple with the complex and intricate problems of the day. Such questions as public health, industrial disease, equitable taxation, and the control of public utilities, can never be adequately met until the standards of public administration have been infinitely improved. This means that the conditions of employment in public administration must be such as will attract and hold the ablest experts and technicians, and conduce to the creation and maintenance of a high quality of professional esprit de corps. The public service can be no better than the type of men it can attract. It needs no argument to demonstrate that real scientists and the highest grade of experts would rarely be induced to accept employment where they might be charged with any offense that might please the fancy of the irresponsible signers of a petition, and where the truth or falsity of the charge would be left to be accidents of a popular election. If democracy is to survive it must prove its competence to develop technical administrative machinery that is able to solve its problems. Surely the adoption of the recall is not a step in that direction.

Any discussion of the recall would not be practical that did not contain a consideration of the alternatives that are available. There are four of these that may claim our consideration. The first one is the fixed term

with popular election. This postpones any action of the public until ample time has elapsed for the officer to have demonstrated what he can do and for the public to have come to a deliberate and mature opinion. It gives the officer a fixed time during which he can give all his attention to the performance of his duties, without the demoralizing fear that he may be called upon to justify his policies and administration in the very midst of an important task. It protects the public against that hasty and precipitate judgment that is incompatible with judicious action. For quasi-political officers this has seemed to be a reasonably satisfactory method.

The second alternative is removal by judicial process. Obviously this would be appropriate only in cases where corrupt and illegal action has been alleged. The superior appropriateness of this procedure to the crude and impossible methods of the recall for determining the guilt or innocence of those accused of improper or illegal conduct, is so obvious as to make comment or argument unnecessary.

The third alternative is removal by executive power. As applied to technical officers and minor administrative officials, this seems especially effective. It has been employed in the federal government with conspicuous success. Its advantages over the recall have been already discussed. Obviously it should not apply to officers that are purely political.

The fourth method is impeachment or legislative address. This has been found to be unwieldy, subject to politics to a great extent, and too cumbersome for the many cases of removal that are continually presented by the ever-growing system of governmental service. As applied to the chief executive and the courts, it may serve as a wholesome check, but it is wholly inadequate

to the many and diverse needs for removal that are constantly occurring.

In the light of these alternatives it seems that the recall is not the most efficient method of removal from office, except, perhaps, in the case of purely political officers, charged with failure to represent accurately their constituents. Even here there are some difficulties to be overcome before it can become a very valuable instrument of popular control. Even were the validity of these conclusions granted, there would still remain those who would advocate the recall upon one or both of two grounds, viz., that the recall, by bringing about more frequent elections and therefore more frequent participation in the affairs of government, tends to increase the civic interest of the voters, and secondly, that the performance of these duties necessarily involves the education of the citizen. If these two contentions are sound they afford very persuasive reasons why the recall should be adopted and retained, even though it be otherwise inefficient as an instrument of government.

To the first proposition two observations are pertinent. The first is the well-known principle of human nature that when one has two chances at making a decision, the average person will take less interest in the first chance. Nothing is more demoralizing to students than the consciousness that if they fail in their work, another opportunity will be given them without penalty. In so far as the recall affects the interest of the average voter in the election, it would seem logical that it would affect him the same way. If there is a recall by which an officer can be removed in case he turns out to be undesirable, it is but natural for the voter to be more careless in his selection than if he knew that once elected the man would hold office for a fixed term. The more there

is at stake in a given election, the more interest it is likely to arouse.

The second observation is that experience seems to show that a multiplicity of elections, instead of increasing the interest of the voter, tends to confuse and discourage the average person. The whole psychology of the short ballot movement is based upon the proposition that if the voter's duties be simplified, their importance augmented, and the ease with which they can be intelligently discharged increased, his interest will be proportionately heightened. This seems to have been amply demonstrated in national politics, where the people elect only the members of Congress, the Vice-President, and the President. The interest in the presidential election, the general intelligence displayed, and the care with which the candidates are studied, show that when the duty is simplified and its proper discharge made obviously important, the voter will respond with increasing interest and zeal. The more elections there are, the less importance necessarily attaches to each, the voters' duties become increasingly difficult to perform, while the natural civic incentive diminishes in a corresponding ratio. It seems difficult to believe, therefore, that the additional elections, provided by the recall, will increase the civic interest and stimulate the overworked voter to new energy and zeal.

Will this multiplicity of elections, and the new duties thrown upon the elector by the recall, result in the political education of the people? If it were the custom and nature of the people to prepare carefully for every political duty imposed upon them, it would doubtless follow that the more duties imposed, the greater would be their political training and knowledge. If this be true one might expect to find the people in cities, where the voters elect a long list of municipal officers, boards,

and commissions, the most intelligent and the best informed upon all matters of municipal government. But again experience has shown that such is not the case. There is incontrovertible evidence to the effect that the more duties that are thrown upon the electorate, the less attention and study is given to the matter by the voter, and for the very simple reason discussed above, that under such circumstances the voter takes less interest in the affairs at stake. Every student of politics will agree that the weakness of democracy is, to a large extent, due to the incapacity or the unwillingness of the average citizen to prepare himself adequately for the civic duties that are imposed. It is certainly a violent assumption to suppose that by increasing both the number and complexity of political duties, through the adoption of the recall, the citizen will receive a larger capacity or renewed willingness and zest adequately to prepare himself for the new duties thus imposed. The simplification of the voter's duties until they come within the limits of time and interest that the average citizen will devote to them, and the corresponding increase in the importance of such tasks, until their vital significance affords a dramatic appeal to instinct and imagination, would seem to offer the most rational basis for the civic improvement and the political education of the people.

SUGGESTIVE QUESTIONS FOR

CHAPTER IX

I. A judge is subjected to a recall election, charged with having decided a case contrary to the law. Is a public opinion possible in the election?

II. Suppose he is charged with fraud, would a public opinion on the issue be possible?

III. Suppose he is charged with general incompetence, would a public opinion be possible on that issue?

IV. "The recall of public officers is a club in the hands of the public by which officers may be made responsive to the public." Criticize the foregoing statement.

V. Are there any other methods of official removal that you deem superior to the recall and what are they?

VI. What would be the effect of the recall upon the type of men attracted to public office?

VII. What would be the effect of the recall upon the conduct of a man in office?

VIII. What would be the effect of the recall upon the voters' attitude toward the regular election?

IX. What would be the effect of the recall of judicial decisions upon the courts?

X. Would you favor the recall of the decisions of the state board of health?

CHAPTER X

THE SHORT BALLOT AND POPULAR GOVERNMENT

THE evils of representative government in America have been found to flow from the inability or unwillingness of the electorate to select officers competent for their tasks and worthy of the public trust. The people granted to the boss and the machine tremendous power, but failed to throw the spotlight of publicity upon their acts, and too frequently declined to hold them to the theory of strict accountability. The machine, entrusted with many matters of which the public were completely ignorant, subject to pressure by selfish and sordid interests politically as intelligent as selfishly determined, and with no compensating pressure from the friends of decency and virtue, with no legal accountability, and with political responsibility largely hidden by the bewildering intricacies of practical politics, labored under constant temptations to political abuse of every kind. The marvel is not that the machine became corrupt and inefficient as frequently as it did, but that it served the public as effectively and honestly as it has. That America has accomplished substantial progress under these conditions is a remarkable tribute to the political sagacity and the common sense of the people.

That the public have sought to operate a system under circumstances that made such conditions inevitable, however, is not so flattering to their intelligence. It is due largely to the fatal optimism of American democracy, to an unwillingness to view political problems as technical and complex and to the existence of a tyranny of estab-

lished phrases, which too frequently exists, especially when such phrases have the proper rhythmic cadence, and smack of orthodox ideals.

Those who suggested that some of the evils of American politics resulted from the popular attempt to do too much, with the result that the citizens, through indifference or neglect, left many of their functions to the mercy of the boss, were denounced for a lack of faith in the genius of democracy. "You are afraid to trust the people" has too frequently been an effective reply to constructive programs of reform, which sought to cut down the duties and functions of the voter to those which he would be competent and eager to perform. The product of years of thought, research, and investigation, has too frequently been hurled aside, if based upon the recognized limitations of the voters' power, merely because it was not "democratic." The tyranny of established phrases has thus prevented a keen analysis of the problem and scientific efforts toward its solution.

The people have been slow to realize that the limitations of public opinion necessarily constitute the limitations of democracy. Popular government does not depend upon the number of functions the voter performs, nor upon the frequency and complexity of popular elections, but upon the completeness with which governmental activities conform to public opinion. Any vote which does not register true opinion, is not an instrument of popular control. It is merely an abandonment of the decision involved to the caprice of ignorance or to the organized activities of the boss. It is not democracy in any rational usage of the term. When the voters of a state are asked at one election to vote for forty-seven officers, and when not one per cent. of the voters have any knowledge of the candidates for more than six or seven offices, such

a vote is the merest sham of democracy. The only thing that saves the whole proceeding from hollow mockery is the interposition of the boss or the machine. If the people are alert, the politicians will not dare to nominate candidates whose conduct will antagonize the public and lead to popular revolt against the party that is in power. But if, to the burden of the election, is added the duty of nominating all of these candidates by the direct primary, which tends to destroy the doctrine of party responsibility, and to break down the power of responsible political leaders, then there is nothing to prevent the popular election from becoming a gigantic lottery, subject only to the influence of the irresponsible makers of publicity, who are in no way accountable to the opinion of the public.

Thus the direct primary, inaugurated to prevent the evils resulting from the voter's inability to discharge intelligently the duties imposed upon him by an impossible system of elections, has simply doubled the duties thus imposed, and in addition denied the voter much of the assistance before provided by responsible party leadership. The accountability of the boss and the machine to public opinion, may not have been a perfect instrument of popular control, but it was infinitely superior to a vote unguided either by a true opinion of the voters or the activities of the party boss.

The same is true of such other remedies as the initiative, the referendum, and the recall. They all cast new and more complicated burdens upon the voter, already suffering from an excess of civic duties. The facts are that the time and energy that the average voter can and will give to the performance of such duties are limited. If the duties imposed upon him exceed these limits, the duties will not be performed. The remedy is not to be

found, therefore, in increasing the burdens already borne, but in restricting them to the limits established by the interest, intelligence, and energy of the average citizen, and by making them so vitally important that they will challenge his attention and stimulate his interest.

"We are told," observes President Lowell, "that the cure for the ills of democracy is more democracy, but surely that depends upon the disease from which it is suffering. To tell a merchant whose business has outgrown his old methods of personal management that the cure for his inability to supervise it is more supervision on his part, that he ought to pay greater attention to details, might be the advice of a country storekeeper, but it would not be that of anyone familiar with administration on a large scale. Such a person would recommend the appointment of trustworthy permanent agents to relieve him of detail, and would add that if he had in his employ an unusually faithful and capable man he had better keep him as long as possible and make it worth his while to stay. The cure for the ills of popular government is more attention by the people to the things they undertake, and that object is not promoted by undertaking too much. There is a limit to the total amount of labor the whole people can expend on public affairs, and that amount must be divided among the different matters they are called upon to consider. A fraction is diminished by increasing the denominator."[1]

These are the considerations that have led to the demand for the short ballot. To ask the voters to nominate and elect a long list of officers, many of whom are wholly inconspicuous and relatively unimportant, about whom the overwhelming majority of the voters have no information or concern, and where, therefore, there can be no

[1] *Public Opinion and Popular Government*, pp. 108-109.

possible basis for the existence of a public opinion, is to leave the selection of officers either to the dictates of party leaders, or still worse, to the unguided fancy of the uninformed. Under such conditions the professional politician is indispensable to the actual conduct of government. He is the civic specialist. He knows about all the offices that are to be filled, the requirements that are made of the candidates, and the men who are available for the various tasks, whereas the average voter is completely ignorant of all these facts. The voter may either take the recommendation of the party organization, and then hold it responsible for results, or he can reply only upon his own ignorance. Obviously the former is the wiser course, and the one most frequently followed, and it is this fact that makes party responsibility so important in our form of government.

It may be argued that the citizen should take the time to inform himself on all of the candidates and offices that are involved, in order that when the time comes, he could vote intelligently without the aid of the politician or the boss. Undoubtedly such a course of action would be desirable, if possible, but the facts are that the average voter cannot and will not do it, and the instruments of government must be adjusted to the interest, intelligence, and possibilities of the average voter as he really is, and not as he might be. Democracy never will achieve its best success until it is adjusted to the actual facts of life and not based upon impossible presumptions. The only way to restrict the power of the boss and the machine is to make them less indispensable to the conduct of government. If the duties are so simplified that the normal citizen can understand them, so easy to perform that he will find the time, and so tragically important that he will be concerned, he will be more independent

of the boss, and the machine will lose in power. It is too much to expect the politician to disappear, for there will always be need of political leaders who make the public business their chief concern, but it is not impossible so to curtail their power that abuse will be less likely and their responsibility more definite.

As an evidence of how the long ballot deprives the voter of political power and confers it upon the politician, Mr. Richard S. Childs cites an election in Ohio, in 1908, in which the people of Cleveland were asked to elect forty-seven different officers. "When the ballot is long," observed Mr. Childs, "i. e., when there are many offices to be filled simultaneously by popular vote, the people (except in village elections where they can recognize every name at sight) will not scrutinize every name, but will give their attention to a few conspicuous ones and vote for the others blindly. In voting blindly for any name the politicians select, the people are simply delegating their choice to a few half-known, irresponsible men whom they had no voice in choosing. The attempt to get the people to say who shall be county clerk, for instance, has failed. It is like asking a question of a crowd and accepting the few scattering answers as the verdict of the whole mob. It is not democracy, but obligarchy, just as in the imagined case of a county that held incessant elections at an inconvenient polling-place. In this case it is not the inconvenience of *voting* which practically disfranchises the bulk of the citizens, but the inconvenience of *voting intelligently*. In the test of practice it has thus been demonstrated that if the people are asked forty-seven questions at one time, they will not give back forty-seven answers of their own, but will let others make most of these answers for them.

"This is no reflection on the morals or intelligence of

the people. (Even if it were, in planning a workable democracy we should have to cut our cloth accordingly.) It is simply evidence that there is such a thing as asking the people more questions than they will answer carefully. In blindly ratifying party nominations the people of Ohio are doing a much better thing than voting at random or not voting at all. The controlling elements in the party have some slight responsibility and some desire to 'make good.' There is some chance to blame and punish some one if things go wrong. * * *

"Thus the sheer amount of political work thrust on the Ohio citizen is so great that he cannot perform it intelligently without the impossible sacrifice of economic efficiency. The typical Ohio citizen, therefore, wisely defaults these excessive political obligations which are thus arbitrarily put upon him, leaving the control in the hands of those few who for one reason or another can take time and energy for such work. A ballot of forty-seven offices thus makes citizenship a specialty—a profession—a thing for experts and not for the people."[1]

To the argument that the only hope of representative democracy is to stimulate the citizen to the point of interest where he will make a careful and elaborate investigation of the forty-seven different offices to be filled, and the qualifications of the several candidates for each of these forty-seven places, the same author makes the following forceful reply: "That the American electorate has never seen fit to adopt this plan is, possibly, rather fortunate, for if 'all good citizens' *did* go into politics, taking an active, constructive part in the selection of all officials, industry prior to each election would suffer wholesale demoralization. Moreover, a citizenship that devotes itself primarily to earning a livelihood, caring

[1] *Short-Ballot Principles*, pp. 24-26, 29.

for a family and going to bed o' nights is seeing things in reasonably true perspective when it 'hasn't time' to go downtown on a rainy evening to argue regarding the nomination of Jones for county clerk. And, finally, whether it ought or oughtn't, it won't. So that settles it. Human nature has not changed perceptibly since Adam, and a plan of government that involves radical alteration in the consciences of fifteen or twenty million citizens will wait forever for its intended consummation. To berate the electorate for indifference when it fails to fulfill this or that set of demands is as useless and unscientific as berating a horse for failing to grow a square neck to fit a new-style square collar. And as we can't induce the electorate to change its nature to fit the present government, we must reshape the government to fit the electorate, with absolute deference to all the latter's frailties."[1]

Furthermore, Mr. Childs believes that these evils of representative government are not going to be remedied by the direct primary, for that merely aggravates the existing intolerable situation. Referring to the Ohio election he inquired, "Can you imagine any ordinary voter, comparing the individual merits of each candidate in each of the forty-seven scrimmages? An election purports to gather opinions, but such an election would do nothing of the sort. It would be like letting the school children vote—the result would represent little or nothing. In big, direct primary elections, where there are not tickets, the boss is often plausible when he argues: 'You had at least my judgment under the old convention system—now you have nobody's judgment, for the people do no thinking at all on the majority of the names,

[1] "Politics without Politicians," *Saturday Evening Post*, Jan. 22, 1910.

and the result is only the outcome of an unjudged, irresponsible scramble for office, frequently participated in by knaves whom I would have excluded.'

"No, curse the boss all you please, but we are indebted to him for doing the work which the electorate ignores, and thus making our institutions workable."[1]

Thus the efforts of the advocates of direct democracy to secure popular government have defeated the very aims to which their efforts were directed. This has been aptly summarized by Mr. Albert M. Kales. "Formerly unpopular government was founded upon the absence of any voting. Today the electorate, while voting furiously, has nevertheless been deprived to a large extent of the ballot because a burden of knowledge—an educational qualification, in effect—has been placed upon it which, under present conditions, it does not and cannot fulfil. Thus, by the simple process of too much so-called popular democracy—that is, too much decentralization of governmental power and too much voting—we have arrived at the essential condition which invites the establishment of unpopular government—namely, the disfranchisement of the electorate."[2]

But this is not all. Not only are the people placed in a position where they have no real choice in the selection of officers, but they cannot even watch them when once in power. If the people of a city elect twenty-five municipal officers, only three or four of whom they can know, and things go wrong in the city's administration, how can they correct the evil? Under such conditions responsibility is so divided that every officeholder can evade public scrutiny. The voters will not take the time to locate the responsibility when it is concealed

[1] *Ibid.*
[2] *Unpopular Government in the United States*, p. 48.

behind such a network of decentralized authority. When a glaring evil is disclosed, it frequently takes a specialist in city politics to locate the guilty man, so complicated is the system. Behind this smoke screen of decentralized and confused responsibility, the guilty officers may rest secure from the retribution of public wrath. Criminal prosecutions of officials accused of graft have amply demonstrated the truth of this assertion. Graft has frequently been uncovered with little effort, but when it came to fix the responsibility upon the guilty man, all efforts failed. If the energy and resourcefulness of the public prosecutor, aided by special investigators, detectives, and experts, have difficulty in locating the guilty man, how can it be expected that the average voter will be able to hold the officers to strict account?

Under these conditions the occasional outbursts of public indignation frequently spend themselves in impotence, for as Professor Ross has observed, "The might of public wrath is destroyed by anything that diverts it from an individual and spreads it harmlessly over a network of administrative responsibility. The common indignation, always confused by a shifting responsibility, is most baffled when responsibility on being traced back is found to be lodged in a body of men. It is this fact that accounts for the increasing disregard of public opinion in the management of business. Corporate organization opposes to public fury a cuirass of divided responsibility that conveys away harmlessly a shock that might have stretched iniquity prone."[1]

Undoubtedly this partially accounts for the superior efficiency and responsiveness of the federal administration as compared with that of the average state or city. If one does not approve of the conduct of foreign affairs,

[1] *Social Control*, p. 97.

the administration of the public lands, the enforcement of federal law, or the operation of the post office, one does not hesitate to apply the doctrine of strict accountability to the President of the United States. If the public become outraged by the mismanagement of federal affairs, the chief executive rightly becomes the immediate object of their attack. It is not necessary first to seek out from the mass of administrative detail the source of the wrong or error; for the people have only elected one executive and have concentrated in his hands the complete control of the administration. He can be held to just and effective accountability for every detail. The result is that in the federal government, where the people elect only one man to executive power, and one other as an alternate, they become interested in the simple but tremendously important task; they bring to bear upon it a vigor and an intelligence that is lacking in their votes upon state and municipal executives; they watch the office with eagerness and understanding, and they have a conspicuous, definite personality upon whom public opinion may effectively pass its verdict of censure or approval. With the short ballot, public opinion becomes articulate and effective, and popular control an existing fact. With the long, complicated ballot, public opinion does not exist in the great majority of cases, it is not effective in the few cases where it does, and real popular government is little better than a myth, except where it is given an opportunity to function through the responsibility of political parties.

To adjust our form of government to the inherent limitations of public opinion is merely the obvious and necessary way of making democracy real and practical. This means to limit the political activities of the voter to those things upon which he may have an opinion, and

in the expression of which he will have an obvious interest. In other words, the people must not be asked to elect at the most more than three or four officers at any one time, these officers must be so important and powerful that they will attract attention, and the responsibility must be so concentrated in their hands that the voter may easily hold them accountable for the results of government. With politics so arranged, public opinion has a chance to function, and the voters' obligations may conceivably be performed with intelligence and dispatch.

If, for example, the people of a city elect only their member of the council and the mayor, leaving all of the administrative officers to be appointed or removed by the latter, it seems inevitable that the people would take greater interest in the election, vote with much greater intelligence, and, because they could then hold the mayor to absolute responsibility, exercise a more effective control over the affairs of the administration. On the other hand, to have them voting for twenty-five minor city officials, of whom they are ignorant, and with official responsibility evaded in the multiplicity of their relations, means nothing more significant than hopeless confusion and impotence. And yet this multiplicity of elective officers is defended by many as indispensable to democracy.

The short ballot idea also facilitates the solution of the problem presented by the apparent conflict between technical efficiency and popular control. At a time when the demand for larger participation in the affairs of government is keeping pace with the rapidly growing need for the utilization of the technical expert in public administration, this question becomes one of vital importance. Temperamental radicals, with a credulous faith in the omnipotence of majorities, talk glibly of direct democracy as a panacea for all our ills. When informed

that the technical problems of the public cannot be solved by a "show of hands" they easily reply that direct democracy will simplify the problems. But the scientific student knows it is not so simple. Democracy must be adjusted to meet the needs of modern society or democracy will not endure.

Athens fell partly because of the lack of experts. Officers were selected by a process of rotation or by lot, and were ineligible for reëlection. Thus the public was guaranteed against the possible dangers of bureaucracy, complete political equality was assured, and the incompetence of mediocricy was fastened upon the people. While their life remained simple this system could endure, but when it came into conflict with a highly organized monarchy under Philip of Macedon it paid the inevitable penalty of incompetence. Likewise a similar amateur system worked well in Rome, until they were confronted with the complicated problems of industry, commerce, and diplomacy, when it fell of its own weight, partly because of its inability to bring expert aid and experience to the solution of its public problems.

The recent war raised the question as to whether democracies could endure amidst the rivalries and conflicts of modern life. The marvelous power of Germany was largely attributed to its remarkable utilization of the expert in the affairs of state. Nor does the winning of the war give a final solution of the problem. The great nations and peoples of the world are now engaging in a tremendous contest for the trade and commerce of the earth. Victory or defeat in this great contest may be fraught with as great significance to the national weal as were the conflicts fought upon the battlefields of France. Whether America will hold her own will depend upon the capacity of our people to utilize as effec-

tive, scientific, and expert methods as those used by the competing nations. "Whether popular government will endure or not," declares President Lowell, "depends upon its success in solving its problems, and among those none is more insistent than the question of its capacity both to use and to control experts, a question closely interwoven with the nature, the expression, and the limitation of public opinion."

Enough has been written in preceding chapters regarding the technical character of modern problems to show the imperative necessity of expert service in solving the questions of the day. If public health is to be adequately guarded, if the life and limb of the worker are to be protected, if our systems of taxation and finances are to be adequate and just, if the organization of our industrial resources are to be perfected on a progressive and an efficient basis, if the distribution of wealth is to be equitably achieved—if all of these vital problems are to be ably met, we shall need the ablest scholars and the most efficient experts that civilization can produce.

This presents two distinct problems, viz., what process of selection will secure the best experts, and how will any connection between the work of the experts and the demands of public opinion be established? We have given sufficient attention in preceding chapters to the popular election of experts to make it clear that such an election does not represent a true opinion. This, we have seen, means that in such occasions the selection is governed by chance or by the political machine. In neither of these cases have the results been of such a character as to justify the system as an effective method of selecting experts.

Another method, which was widely employed in the early day of the Republic, was legislative appointment. This worked very badly and was soon generally aban-

doned. "The natural consequence seems to have been," observed Professor Beard, "in nearly every case, that the appointing power passed from the public authorities in which it was vested by law into the hands of organizations unknown to the law and only slightly or not at all subject to the pressure of public opinion. Appointment by the legislature on a large scale was a new experiment in American politics, for the power had not been generally exercised by colonial legislatures; and it required very little experience to demonstrate that appointment by a numerous assembly was about the most successful way of destroying responsibility that could have been devised."[1]

This leaves but one alternative and that is executive appointment. Give to the executive officer full power of appointment and removal, and then let the public hold him to strict accountability for the results that he achieves, and we have the best method yet devised, either by private business or by public effort, to secure a high grade of technical service, and yet subordinate it to the demands of public opinion. One of the main requisites of a chief executive is his capacity to estimate properly the qualifications of those available for the positions to be filled. To be able to select wisely from the list of men, to get a well-balanced personnel for the performance of a given task—men who will work together and coöperate with maximum efficiency—to stimulate, direct, and coördinate their efforts, and to see that they got the results that public opinion is demanding, is the real function of the chief executive in government. That this could be done by the voters directly seems too absurd to argue. And yet it is not unusual to see local and state elections where such methods are attempted.

[1] *American Government and Politics*, p. 92.

But how may such experts be kept subject to public opinion? How may we keep them from becoming bureaucratic? How can we prevent them from being the rulers rather than the ruled? It is useless to ignore this problem, for it is here. There is nothing in the nature of the expert to keep him efficient or responsive and some method must be devised to protect the public from possible abuse. It must be remembered that in regard to experts and their service, the public have but one concern and that is to get results. They do not care about what scientific theories are employed by the State Board of Health so long as they succeed in banishing disease. They do not care what principles of accounting employed by the auditor, so long as the money is honestly, legally, and efficiently expended and accounted for. They are not interested in questions of technical policy with which the state engineer must deal, so long as he gets the results for which he is employed. In other words, all that the public asks of its experts is to keep the public point of view and get the required results. From what has gone before it seems fairly obvious that this can be best accomplished by vesting the appointment and removal of the expert in the executive head and making him directly accountable to the public. The executive is the only one competent to pass upon the efficiency of the expert, and if the public holds him accountable for results secured, that provides sufficient safeguard against the abuse of the appointing and removing power.

Doubtless it will be argued that it is dangerous to leave so much to the discretion of the chief executive officer, who may conceivably make mistakes or fail to utilize his vast powers to the public advantage. It must be admitted that the mere adoption of the short ballot will not mitigate the evils of civic indifference. There

is nothing in this device that is either automatic or fool proof. The political scientist cannot guarantee that the people will use the instruments of self-government with intelligence and devotion. All that the student of politics can do is to provide the voter with instruments suitable to his task. In the short ballot it is believed that the voter will find such an instrument which he can use with the maximum of efficiency and the minimum of effort. The history of executive appointments in local and state government, so far as it has been tried, has given results that are not entirely reassuring. Rotation in office and political pressure have weakened the efficiency of the system. But that is not due entirely to the system of executive appointments. As compared with the system of popular election of the same officials it has demonstrated obvious advantages. The real difficulty is the lack of a public appreciation of the importance of technical service. The indifference with which the public views wholesale violations of the civil service laws bears eloquent testimony to this fact. Too many of our people are more concerned with the methods of popular election than with the results secured. We have been sacrificing substance for form. If officers were popularly elected, or subjected to the popular recall, or if our laws were enacted by the initiative and referendum, we have been content, regardless of the tragic mistakes and impossible results.

A great American statesman has answered to this criticism of direct democracy, that if democracy makes mistakes no one should object, for democracy has the right to make mistakes. With such an easy-going philosophy of popular government too many of the public are in complete accord. No change in the forms of government will remedy this obvious defect. But when the

people do decide that they want results, that they want as effective service in public business as prevails in private enterprise, that they want the substance of democracy rather than its empty forms, the short ballot will be an effective instrument in their hands. It makes no demand upon the intelligence and energies of the citizen that cannot reasonably be met. It makes the citizen's point of contact with government specific, definite, and direct. It implies tasks that are within the range of the experience and observation of the average voter. It makes the process of checking up the results achieved by the officer he elects both interesting and easy. It confines election to that domain in which public opinion may control. It makes the government popular in fact as well as in form.

President Lowell finds excellent examples of the proper relations between the political executive and the permanent expert in the fields of business. "In our great private industries and educational institutions," he writes, "the true relations between experts and laymen have been worked out and applied. The president of a railroad and his subordinates are railroad men by profession, skilled experts, and if they were not, the road would not be efficiently, progressively, or even safely, conducted; but the board of directors is composed of bankers, merchants, and other men of general business experience, who make no pretence to the technical knowledge required to manage the road. In fact, they represent the business public—not by election, but by sample—and so far as the sample is not a fair one, and therefore the directors do not faithfully represent the business public, that public, and ultimately the railroad itself, is sure to suffer. In the same way, the presidents of colleges are experts, and most certainly the faculties are; but for

boards of trustees they want, not professional educators, but broad-minded men of the world with scholarly sympathies."[1]

If we are to profit by the experience of private industry we shall only ask the voter to select a competent administrator and leave to him the task of securing and retaining an effective technical service. Upon his success in performing this task will depend his political future as from time to time he comes before the people for their approval or rejection at the polls. No one would think of asking the stockholders of the Pennsylvania Railroad Company to elect an auditor, a chief engineer, a division manager, or a superintendent of motive power. This is not because the stockholders are not the ones most vitally interested, but for the very obvious reason that they can protect their interests much more effectively by attempting to control only the directors, and leaving to them and the officers they select the details of administration and personnel. The same reasoning would seem to apply to the citizens asked to elect a state engineer, an auditor, and a statistician.

In considering the practical application of the short ballot, the question arises as to what officers should the people attempt to elect. The limitations of time and space do not permit of an exhaustive consideration of this question in relation to the state and local government. It seems clear that no officers except those that we have described in the preceding chapter as political or quasi-political, should ever be submitted to popular election or removal. In the federal government, the limiting of popular election to the chief executive and the members of the two legislative branches has given excellent results. Some have argued for the adoption of the

[1] *Public Opinion and Popular Government*, p. 293.

same plan in the state and city, while some have gone still further and argued for the election of a one house legislature in the city or state, leaving to them the selection of a chief executive. The business manager form of city government, which has enjoyed a rapid growth, and which has seemed to be meeting with marked success as compared with the older systems, is an illustration of the latter policy.

Perhaps the question of appointing or electing judges raises the greatest singl. difficulty in this connection. In the great bulk of the functions performed by the court, the judges are technical and not political officers, and the general principle above mentioned would mean that they should be appointed. To this there has been great objection. It has been urged that the courts are political more than technical officers, a contention sufficiently discussed in a preceding chapter. In addition two other reasons for their popular election have been urged. The first is that judges, when appointed, are likely to become too arbitrary and autocratic, and the second is that they are too likely to lose touch with the facts and conditions of modern life, in the light of which the principles of law are to be expounded and applied.

The first objection may be met by making the judges appointed but for a limited period rather than for life or good behavior. To the extent that there is any weight in this objection it would seem to have to do with the length of tenure rather than with the method of selection. Life tenure need not necessarily accompany an appointed judiciary. There is no reason why the tenure and method of re-appointment should not be as adequately safeguarded under the appointive as under the elective system.

The second criticism of the courts is a valid and an important one. Some of the most unfortunate decisions that have occurred can be accounted for on the ground that the court was too ignorant of the general facts and conditions of life to be able to apply the principles of law with both precision and understanding. The case of Lochner v. New York, referred to in a preceding chapter, is an excellent case in point. But the question may well be asked if the popular election of judges will tend to secure men better informed upon existing economic and social conditions. Fortunately we have some evidence on this point. The courts, where judges have been appointed rather than elected, have been much freer from such mistakes. It is universally admitted that these judges have been more liberal and progressive, which, being interpreted, generally means that they were better informed upon the general economic and social facts involved. No state court has a better record in this respect than Massachusetts, where judges are appointed and hold office for life and good behavior. The courts which might be criticized the most freely in this regard have quite frequently been those that have been elected for the shorter terms, and where, therefore, they might be supposed to be the most closely in touch with public opinion. Those who advocated the recall of judicial decisions in 1912 thought it would be unnecessary to apply the doctrine to the federal courts, all the judges of which are appointed and hold office for life or good behavior, since it was generally admitted that their decisions were much more satisfactory. It seems that what is wanted is judges who are more able, more judicial, and more learned, and the evidence is overwhelmingly to the effect that such are more likely to be secured by executive appointment than by popular election.

In discussing the popular election of judges as it now exists in most of our states, Mr. Albert M. Kales declared that "No method could be worse than that which we now employ. Appointment by the politocrats of the extra-legal government is so obscure, especially when effected by primaries, that they are under no responsibility whatever in naming judges and they have little interest in the due administration of justice. Indeed, the situation is worse than that for they may have positive reasons for wishing a type of man from whom they may expect certain courses of action which will actually be inimical to the efficient administration of justice, particularly in criminal causes; or they may be interested in filling judicial offices with those who have done more in the way of faithful service to the organization than in the way of practice in the courts.

" * * * But this much can be affirmed, that any mode of appointment by the governor, since it is conspicuous and legal, and since the governor is directly subject to the electorate, carries with it a measure of responsibility which is not found where the appointment is secret and by the politocrats of the extra-legal government. Appointment by the governor is better than the present misnamed plan of popular election."[1]

Another method of appointment, deserving of consideration, is by the chief justice, who in turn is popularly elected, and who would be vested with general administrative powers over the various courts and judges. This would provide for certain administrative flexibility in judicial matters that would open the way for some very important developments and reforms in judicial administration.

In conclusion we may well inquire as to what will be

[1] *Unpopular Government in the U. S.*, pp. 235, 238.

the effect of the short ballot, first, upon the character of the public administration, and secondly, upon the public and its relation to the government? The first effect upon public administration will be to attract abler men to public office. The position of governor of a state or mayor of a city, as these positions generally exist, while they offer attractive opportunities to ambitious and able politicians, afford little promise to the real administrators and executives of the land. One of real executive ability will not ordinarily accept a position as head of an administrative system, when the most important departmental heads hold their offices through popular elections and absolutely independently of his wishes or authority. Yet such is the situation in almost every state and in the great majority of cities. Nominally, the governor is chief of the administration, but the heads of most of the important administrative departments are entirely independent of his authority. His greatest importance, therefore, is in his position as party leader and his relations to the legislature, which are governed by political rather than administrative considerations. It is not surprising, therefore, that such positions have not frequently attracted men of great administrative talents. But with the inauguration of the short ballot, such positions will offer tremendous opportunities for administrative careers and will appeal, accordingly, to those of large administrative abilities and experience.

Likewise, the public service will attract a better type of technical experts. A man of fine professional attainments and scholarly instincts will not be attracted to public service, where his tenure will be subject to the accidents of party politics. But public service, under the supervision and authority of experienced executives,

which will mean that tenure of office and rapidity of advancement will be determined by the efficiency of the expert, offers a very attractive opportunity to the very best men of professional and technical training.

The second effect upon the public administration is that it will become more amenable to popular control. It has been argued by the opponents of the short ballot that the very opposite will be the result. They contend that to give so much appointing power into the hands of a single executive will enable him to erect a political machine, with which he will be enabled to defy the public. But this objection ignores two fundamental facts. The first is that the chief executive, regardless of his machine, cannot continue himself in power in opposition to the public. He is to be elected by the people, and will come up at periodic intervals at the expiration of his official term for reëlection or defeat. The public can exact what they will as the price of their support. The executive must give them what they demand or be retired from power. If the people demand results as the condition of their support, the securing of those results will become his chief concern. If they are content, however, for him to abuse the power in erecting a personal machine at the sacrifice of efficient service, and they will continue such a man in authority, there is nothing in the short ballot to prevent it. In fact, if the short ballot is effective at all, it will make it easier for the people to get just what they want, whether it be efficiency or graft.

The second fact, ignored by those who fear the short ballot will produce a political machine, is that the long ballot has been the most effective single cause for the growth and power of the professional politician. The impossibilities of the long ballot made the voter dependent upon political experts for advice and guidance, and

the party boss came in to provide the needed counsel. Under the present system the people cannot get along without the boss, even though they would. At present these so-called experts are selected by the party organization, and the degree of popular control that does exist at present, depends entirely upon the degree of party responsibility that has survived the inauguration of the primary legislation in the several states. But with the short ballot, the voter will be no longer so completely dependent upon the boss, and may, if he desires, dispense largely with his services, select a good executive themselves, and hold him directly responsible for the things they want accomplished. It is a choice between leaving the appointment of these officers to the discretion of the party boss, where the fixing of responsibility is difficult and hazardous, or giving the power to the chief executive whose responsibility is definite, fixed, and certain. The interests of both popular control and efficient administration demand the latter.

The effects of the short ballot upon the public and its relations to government would seem to be fourfold. In the first place it will intensify the interest of the voter in the election by making it dramatically important. When one realizes that the whole administration depends upon the one official, that the fate of efficient government depends upon the one "turn of the balance," keener interest in that one event is bound to follow. Secondly, it makes the public's intelligent participation in government much simpler and easier. If the voter is eager for beneficent results from the efforts of government, but in order to secure them has to lock up the records of candidates for forty-seven different offices, and follow them and their achievement through the intricacies of decentralized organization, it will be nothing short of marvelous if his

interest is of sufficient magnitude to sustain him to the end of his difficult and almost impossible task. But if the same results may be secured by reviewing the records of only one executive, whose prominence and importance have brought him continually before the public gaze, and where his responsibility is fixed and definite, both the interest and ease of the voter's undertaking have been conspicuously increased. With a natural stimulus in interest working at one end of the proposition and a greater ease of participation secured at the other end, an increased civic activity must inevitably result.

Thirdly, the short ballot relieves the public of its necessary and complete dependence upon the activities of the politician and the boss. Political duties will be so simplified and the ease of their performance so increased, that only the grossest popular indifference will make necessary the present activities of the political machine. Finally, this movement will tend to concentrate the interest of the public upon substance rather than form. It will tend to fasten attention upon the results rather than the politics of government. It will tend to emphasize the important fact that the test of government is to be found in the actual results that it achieves rather than in the theories that it represents. So long as the public is interested primarily in political theory, the politician and the demagogue need have but little fear. Their lip service to the ideals and aspirations of democracy leaves nothing to be desired. Such issues do no more than provide the necessary smoke screens behind which the corrupt boss may ply his dishonest trade. But let the people learn that it is results that they desire! Let them leave the theories to their philosophers but demand the actual relief from existing evils! Let the people once learn to apply the same standard to governmental af-

fairs that they apply to private enterprise, and demand that the government achieve results, and the rule of the demagogue and charlatan will tend to disappear. Measured by such a standard they cannot survive the public scrutiny. The advent of the short ballot will help to emphasize this important point of view. Its emphasis is necessarily upon results, rather than methods and details. Its chief concern is not with the forms of democratic organization, but with the realities of real achievement and of popular control.

According to President Hadley, "The American people has made some progress toward learning this lesson. We no longer entrust politicians with the command of armies, as was so frequently done in Athens or Rome. A proposal to take the conduct of the army in the field out of the hands of army officers and put it into the hands of members of Congress, which was seriously urged in 1848, would seem quite laughable today. But we need to carry the lesson further in the next century than we have in the last. We are in more immediate competition with Europe now than we were fifty years ago. To keep our place in this competitive struggle, we must prove that a democracy can manage business as well as a monarchy; that it can show the same care in the selection of officials and the same self-restraint in judging of their work before it is done. The people as a whole must assume the double duty of voting intelligently on matters which public opinion can decide and leaving to the specialist matters which can only be decided by the specialist; of holding the expert responsible for results and promoting the man who has done business well rather than the one who flatters the people that he is going to do business in a way that they will like and understand.

Thus, and thus only, can we combine two things which are equally essential to American democracy if it is to hold its place among the nations: popular sovereignty and efficient government."[1]

[1] *Undercurrents in American Politics*, pp. 176-7.

SUGGESTIVE QUESTIONS FOR

CHAPTER X

I. There are eighteen possible candidates for the vacancy in the office of city bacteriologist. Suggest the two best methods of selecting a man for the vacancy. Which do you prefer?

II. There are seven possible candidates for the office of state statistician. Suggest the two best methods of selecting a man for the vacancy. Which do you prefer? What would be the best method of removal?

III. Suppose Question II referred to the state auditor, would your answer be the same?

IV. Would your answer to Question II be the same if it referred to the office of attorney general?

V. If the members of the cabinet of the United States were popularly elected, what effect would it likely have upon the character of men in the cabinet?

VI. What effect would it likely have upon type of men attracted to the presidency? What effect would it have upon nominating methods?

VII. Is it ever possible to have a public opinion upon the public service of a technical expert? If so, how can it be best expressed?

VIII. It is said that the short ballot would so concentrate power in the hands of the governor that he could build up a machine and defeat public opinion. Criticize. Has this been true in the case of the federal government?

IX. Is a public opinion possible upon the general question of efficient administration? How can that opinion be most effectively expressed?

X. What would be the effect of the short ballot upon the voter?

BIBLIOGRAPHY

CHAPTER I

POPULAR OPINION AND POPULAR GOVERNMENT

I. Origin and Purpose of Government.

Garner, J. W., *Introduction to Political Science,* chap. IV, pp. 235-236 (American Book, N. Y., 1910).

Cleveland, F. A., *Organised Democracy,* chap. I, pp. 1-23 (Longmans, Green, N. Y., 1913).

Dealey, J. Q., *The Development of the State,* chaps. I, II, (Silver, Burdett, N. Y., 1909).

II. Nature and Purpose of Democracy.

Garner, J. W., *Introduction to Political Science,* pp. 219-230 (American Book, N. Y., 1910).

Hart, A. B., "Growth of American Theories of Popular Government" in *Am. Pol. Sci. R.,* Vol. 1, pp. 531-60.

Hadley, Arthur T., *Undercurrents in American Politics,* Lecture I (Yale Univ. Press, New Haven, 1915).

Post, Louis F., *Ethics of Democracy,* Introduction (Bobbs, Merrill, Indianapolis, 1916).

III. Public Opinion.

Lowell, A. L., *Public Opinion and Popular Government,* chaps. I-IV (Longmans, Green, N. Y., 1913).

Cooley, C. H., *Social Organization,* chaps. XII, XIII (Scribners, N. Y., 1912).

Ross, E. A., *Social Control,* chap. X (Macmillan, N. Y., 1910).

Ross, E. A., *Social Psychology,* chap. XXII (Macmillan, N. Y., 1911).

Ellwood, C. A., *Sociology in Its Psychological Aspects,* chap. XV (Appleton, N. Y., 1912).

Wallas, Graham, *Human Nature in Politics,* Pt. I, chaps. I-V (Houghfflin, Boston, 1919).

Hadley, A. T., "Organization of Public Opinion" in *No. Am.,* Vol. 201, pp. 191-6.

Shepard, W. J., "Public Opinion" in *Am. J. Soc.,* Vol. 15, pp. 32-60.

Kittle, W., "The Making of Public Opinion" in *Arena,* Vol. 41, pp. 433-50.

Stead, W. T., "Government by Journalism" in *Contemp.,* Vol. 49, pp. 653-74.

Lawrence, David, "Government by Impression" in *Century,* Vol. 96, pp. 117-23.

CHAPTER II

IMPROVEMENT OF PUBLIC OPINION

I. The Press.

Holt, H., *Commercialism and Journalism* (Houghton, Mifflin, Boston, 1909).

Scott, James R. A., *Influence of the Press* (Partridge, London, 1913).

In Thorpe, M., *The Coming Newspaper* (Holt, N. Y., 1915), see:

O'Hara, B., "State License for Newspaper Men," pp. 148-162.

Bullen, P. S., "English Substitute for the License Plan," pp. 162-171.

Lee, J. M., "Code of Ethics for Newspaper Men," pp. 171-188.

Howard, R. W., "Government Regulation for Press Association," pp. 188-205.

Judge, M. H., "Should Not the Publishing of False News Be by Law a Misdemeanor?" in *Westm.*, Vol. 166, pp. 617-18.

"Function of an Endowed Press" in *Nation*, Vol. 82, pp. 49-50.

"Endowing Newspapers" in *Nation*, Vol. 107, pp. 60-1.

"Advertising and the Press" in *Nation*, Vol. 108, pp. 1000-1.

Pennypacker, S. W., "Sensational Journalism and the Remedy" in *No. Am.*, Vol. 190, pp. 587-93.

II. Political Parties.

Gettell, R. G., *Readings in Political Science*, pp. 401-23 (Ginn, N. Y., 1911).

Beard, C. A., *American Government and Politics*, 3rd ed., pp. 99-125 (Macmillan, N. Y., 1920).

Munro, W. B., *Government of American Cities*, 3rd ed., pp. 153-79 (Macmillan, N. Y., 1912).

Fess, S. D., *The History of Political Theory and Party Organization in the United States*, chap. I (Ginn, N. Y., 1910).

Cleveland, F. A., *Organized Democracy*, chaps. XVIII, XIX (Longmans, Green, N. Y., 1913).

Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 3-13 (Scribners, N. Y., 1917).

Jones, C. L., *Readings on Parties and Elections*, pp. 3-37 (Macmillan, N. Y., 1916).

Macy, J., *Party Organization and Machinery*, pp. 3-24 (Century, N. Y., 1912).

Ostrogorski, M., *Democracy and the Party System in the United States*, pp. 364-421 (Macmillan, N. Y., 1910).

McLaughlin, A. C., *The Courts, the Constitution and Parties*, pp. 111-185 (Univ. of Chicago Press, Chicago, 1912).

Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States*, 2d ed., pp. 295-303 (Putnam, N. Y., 1916).

DeTocqueville, A., *Democracy in America*, Vol. 1, pp. 221-229 (Sever and Francis, Cambridge, 1864). Tr. by Henry Reeve; ed. with notes by Francis Bowen.

Ford, H. J., *Rise and Growth of American Politics*, pp. 294-310 (Macmillan, N. Y., 1898).

Sloane, W. M., *Party Government in the United States*, chap. I (Harper, N. Y., 1914).

III. Education.

Baldwin, Simeon E., *The Relations of Education to Citizenship* (Yale Univ. Press, New Haven, 1912).

Brewer, David J., *American Citizenship*, chaps. I, III, V (Yale Univ. Press, New Haven, 1911).

Bryce, James, *The Hindrances to Good Citizenship* (Yale Univ. Press, New Haven, 1910).

Hadley, Arthur T., *The Education of the American Citizen* (Yale Univ. Press, New Haven, 1914).

Folk, J. W., "The Responsibility of Citizenship" in *Vanderbilt University Quarterly*, Vol. 5, pp. 155-61).

Inglis, Alexander, *Principles of Secondary Education* (Houghton, Mifflin, Boston, 1918).

Thaler, W. H., "On Education and the New Democracy" in *Educa. R.*, Vol. 59, pp. 12-18.

Snedden, D., "Some New Problems in Education for Citizenship" in *Int. J. Ethics*, Vol. 30, pp. 1-15.

Hall, A. B., *Dynamic Americanism* (Bobbs, Merrill, Indianapolis, 1920).

IV. The Citizen and Democracy.

Rowe, L. S., "The Relation of Municipal Government to American Democratic Ideals" in *Am. J. Soc.*, Vol. 2, pp. 75-84.

Godkin, Edwin L., *Problems of Modern Democracy*, pp. 275-311 (Scribners, N. Y., 1896).

Hughes, Charles Evans, *Conditions of Progress in Democratic Government*, Lecture I (Yale Univ. Press, New Haven, 1910).

Root, Elihu, *The Citizen's Part in Government* (Yale Univ. Press, New Haven, 1916).

Cleveland, F. A., *Organized Democracy*, chaps. VII-IX (Longmans, Green, N. Y., 1913).

CHAPTER III

Representative Government and Direct Democracy

I. Representative Government.

Garner, J. W., *Introduction to Political Science*, pp. 458-488 (American Book, N. Y., 1910).

Leupp, F. E., "Do Our Representatives Represent?" in *Atlantic*, Vol. 114, pp. 433-43.

Buchan, J., "Democracy and Representative Government" in *Fortn.*, Vol. 100, pp. 858-69.

Lowell, A. L., "Expert Administrators in Popular Government" in *Am. Pol. Sci. R.*, Vol. 7, pp. 45-62.

Cleveland, F. A., *Organized Democracy*, chap. VI (Longmans, Green, N. Y., 1913).

Reed, T. H., *Government for the People*, chap. II (Huebsch, N. Y., 1915).

Wallas, Graham, *Human Nature in Politics*, Pt. II, chaps. II, III (Houghton, Mifflin, Boston, 1919).

Taft, W. H., *Popular Government*, chaps. I-V (Yale Univ. Press, New Haven, 1913).

Lowell, A. L., *Public Opinion and Popular Government*, chaps. IX, X, XVI (Longmans, Green, N. Y., 1913).

Mill, John Stuart, *Utilitarianism, Liberty and Representative Government* (Dutton, N. Y., 1914).

CHAPTER IV

THE DIRECT PRIMARY AND THE STATE NOMINATING CONVENTION

I. Necessity and Function of Political Parties.
- Gettell, R. G., *Readings in Political Science*, pp. 401-23 (Ginn, N. Y., 1911).
- Beard, C. A., *American Government and Politics*, 3rd ed., pp. 99-125 (Macmillan, N. Y., 1910).
- Munro, W. B., *Government of American Cities*, 3rd ed., pp. 153-79 (Macmillan, N. Y., 1920).
- Fess, S. D., *The History of Political Theory and Party Organization in the United States*, chap. I (Ginn, N. Y., 1910).
- Cleveland, F. A., *Organized Democracy*, chaps. XVIII, XIX (Longmans, Green, N. Y., 1913).

II. Machines and Bosses.
- Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 433-458 (Scribners, N. Y., 1917).
- Ostrogorski, M., *Democracy and the Party System in the United States*, pp. 225-281 (Macmillan, N. Y., 1910).
- Ford, H. J., *Rise and Growth of American Politics*, chap. XXIV (Macmillan, N. Y., 1898).
- Goodnow, F. J., *Politics and Administration*, chap. VIII (Macmillan, N. Y., 1900).
- Lowell, F. C., "The American Boss" in *Atlantic*, Vol. 86, pp. 289-99.
- Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States*, 2d ed., chap. XVII (Putnam, N. Y., 1916).
- Hendrick, B. J., "The Twilight of Tammany Hall" in *World's Work*, Vol. 27, pp. 432-40.
- "The Larger Hope Against Tammany" in *Century*, Vol. 85, pp. 951-2.

III. Machine Methods and Their Remedies.
- Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 458-481 (Scribners, N. Y., 1917).
- Jones, C. L., *Readings on Parties and Elections*, pp. 274-298 (Macmillan, N. Y., 1916).
- Ostrogorski, M., *Democracy and the Party System in the United States*, pp. 330-363 (Macmillan, N. Y., 1910).
- Woodruff, C. R., "Graft and Grafting: What Are the Remedies?" in *Am. J. Soc.*, Vol. 19, pp. 468-79.
- Root, Elihu, "Invisible Government" in *R. of R.*, Vol. 52, pp. 465-7.
- Bryce, James, *American Commonwealth*, Vol. 2, pp. 87-96 (Macmillan, N. Y., 1910).
- Porritt, E., "Political Corruption in England" in *No. Am.*, Vol. 183, pp. 995-1004.

IV. Nominating Methods—The Caucus.
- Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., chap. IV (Scribners, N. Y., 1917).
- Jones, C. L., *Readings on Parties and Elections*, pp. 37-52 (Macmillan, N. Y., 1916).
- Ostrogorski, M., *Democracy and the Party System in the United States*, pp. 3-15 (Macmillan, N. Y., 1910).
- Woodburn, J. A., *American Politics, Political Parties and Party*

Problems in the United States, 2d ed., pp. 165-174 (Putnam, N. Y., 1916).
Dallinger, F. W., *Nominations for Elective Office in the United States,* pp. 3-21 (Longmans, Green, N. Y., 1897).
Meyer, E. C., *Nominating Systems,* chap. I (E. C. Meyer, Madison, Wis., 1902).
Cleveland, F. A., *Organized Democracy,* chap. XV (Longmans, Green, N. Y., 1913).
Beard, C. A., *Readings in American Government and Politics,* pp. 112-118 (Macmillan, N. Y., 1913).

V. Nominating Methods—The Convention.
Ray, P. O., *An Introduction to Political Parties and Practical Politics,* Rev. ed., chap. V (Scribners, N. Y., 1917).
Jones, C. L., *Readings on Parties and Elections,* pp. 53-66 (Macmillan, N. Y., 1916).
Ostrogorski, M., *Democracy and the Party System in the United States,* pp. 16-71 (Macmillan, N. Y., 1910).
Dallinger, F. W., *Nominations for Elective Office in the United States,* pp. 21-36 (Longmans, Green, N. Y., 1897).
Cleveland, F. A., *Organized Democracy,* chap. XV (Longmans, Green, N. Y., 1913).
Meyer, E. C., *Nominating Systems,* chaps. IV, V (E. C. Meyer, Madison, Wis., 1902).
Beard, C. A., *Readings in American Government and Politics,* pp. 119-125 (Macmillan, N. Y., 1913).

VI. Nominating Methods—The Direct Primary.
Ray, P. O., *An Introduction to Political Parties and Practical Politics,* Rev. ed., chap. VI (Scribners, N. Y., 1917).
Jones, C. L., *Readings on Parties and Elections,* pp. 67-79 (Macmillan, N. Y., 1916).
Merriam, C. E., *Primary Elections,* pp. 117-176 (Univ. of Chicago Press, Chicago, 1908).
Fanning, C. E., *Selected Articles on Direct Primaries,* 4th ed. (H. W. Wilson, White Plains, N. Y., 1918).
Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States,* 2d ed., chap. XX (Putnam, N. Y., 1916).
Ford, H. J., "The Direct Primary" in *No. Am.,* Vol. 190, pp. 1-14.
Woolen, Evans, "The Direct Primary Experiment" in *Atlantic,* Vol. 110, pp. 41-5.
Miller, J. D., "The Failure of the Primary" in *Forum,* Vol. 50, pp. 48-58.
"Recent Experiments with the Primary" in *World's Work,* Vol. 33, p. 7.
Papers and addresses on primary reform read at the annual meeting of the Michigan Political Science Association, Ann Arbor, 1905. (Publication of the Mich. Pol. Sci. Ass., Vol. VI, No. 1.)
Reinsch, Paul S., *Readings on American State Government,* pp. 383-394, 414 (Ginn, N. Y., 1911).
Cleveland, F. A., *Organized Democracy,* chaps. XV-XVII (Longmans, Green, N. Y., 1913).
Cross, Ira, "Direct Primaries" in *Arena,* Vol. 35, pp. 587-90.

Brickner, Isaac M., "Direct Primaries versus Boss Rule" in *Arena,* Vol. 41, pp. 550-6.
Woodruff, C. R., "Nomination Reform in America" in *Forum,* Vol. 42, pp. 483-505.
"The Primary No Cure All," in *Nation,* Vol. 87, pp. 131-2.
Shaw, W. B., "Direct Primary on Trial" in *Outlook,* Vol. 90, pp. 383-9.
Binkerd, R. S., "Doom of the Old 'Machine' Convention" in *R. of R.,* Vol. 41, pp. 497-9.
Blair, E. N., "Every Man His Own Campaign Manager" in *Outlook,* Vol. 97, pp. 426-33.
Merriam, C. E., *Primary Elections* (Univ. of Chicago Press, Chicago, 1908).
Meyer, E. C., *Nominating Systems, Direct Primaries versus Conventions in the United States* (E. C. Meyer, Madison, Wis., 1902).
Remsen, Daniel S., *Primary Elections* (Putnam, N. Y., 1894).

CHAPTER V

The Presidential Primary

I. The National Convention—Composition and Call.

Jones, C. L., *Readings on Parties and Elections,* pp. 80-88 (Macmillan, N. Y., 1916).
Ray, P. O., *An Introduction to Political Parties and Practical Politics,* Rev. ed., pp. 203-211 (Scribners, N. Y., 1917).
Ostrogorski, M., *Democracy and the Party System in the United States,* pp. 133-146 (Macmillan, N. Y., 1910).
Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States,* chap. X (Putnam, N. Y., 1916).
Dallinger, F. W., *Nominations for Elective Office in the United States,* pp. 74-84 (Longmans, Green, N. Y., 1897).
Bryce, James, *The American Commonwealth,* Vol. 2, chap. LXIX (Macmillan, N. Y., 1910).
Bishop, J. B., *Presidential Nominations and Elections* (Scribners, N. Y., 1916).
Macy, Jesse, *Party Organization and Machinery,* chap. VI (Century, N. Y., 1912).
Blythe, Samuel, "The Same Old Game" in *Saturday Evening Post,* March 20, 1920.

II. The Work of the National Convention.

Jones, C. L., *Readings on Parties and Elections,* pp. 89-106 (Macmillan, N. Y., 1916).
Ray, P. O., *An Introduction to Political Parties and Practical Politics,* Rev. ed., pp. 211-220 (Scribners, N. Y., 1917).
Ostrogorski, M., *Democracy and the Party System in the United States,* pp. 147-160 (Macmillan, N. Y., 1910).
Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States,* chap. XII (Putnam, N. Y., 1916).
Bryce, James, *The American Commonwealth,* chap. LXX (Macmillan, N. Y., 1910).
Bishop, J. B., *Presidential Nominations and Elections* (Scribners, N. Y., 1916).

Harvey, George, "The National Conventions," in *No. Am.*, Vol. 204, pp. 1-13.

III. Presidential Nomination—Convention v. Presidential Primary.

Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 190-203 (Scribners, N. Y., 1917).

Aylsworth, L. E., "Presidential Primary Elections" in *Am. Pol. Sci. R.*, Vol. 6, pp. 429-33.

Dickey, F. W., "The Presidential Preference Primary" in *Am. Pol. Sci. R.*, Vol. 9, pp. 467-87.

Barnett, J. D., "Presidential Primary in Oregon" in *Pol. Sci. Q.*, Vol. 31, pp. 81-104.

Holcombe, J. W., "The Electoral College" in *Forum*, Vol. 48, pp. 526-34.

Holcombe, J. W., "A Presidential Preference Vote and the Electoral College" in *Forum*, Vol. 48, pp. 681-6.

Rosewater, V., "President-Choosing" in *R. of R.*, Vol. 34, pp. 333-6.

Potts, C. S., "The Convention System and the Presidential Primary" in *R. of R.*, Vol. 45, pp. 561-6.

Laprade, W. T., "The Nominating Primary" in *No. Am.*, Vol. 200, pp. 235-43.

Davenport, F. M., "The Failure of the Presidential Primary" in *Outlook*, Vol. 112, pp. 807-10.

IV. Election of President.

Jones, C. L., *Readings on Parties and Elections*, pp. 106-124 (Macmillan, N. Y., 1916).

Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 182-184 (Scribners, N. Y., 1917).

Ostrogorski, M., *Democracy and the Party System in the United States*, chaps. IX, X (Macmillan, N. Y., 1910).

Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States*, pp. 197-218 (Putnam, N. Y., 1916).

Dougherty, J. H., *The Electoral System of the United States* (Putnam, N. Y., 1906).

Bryce, James, *The American Commonwealth*, Vol. 2, chap. LXXI (Macmillan, N. Y., 1910).

CHAPTER VI

Initiative and Referendum

I. Reasons for the Adoption of the Initiative and Referendum.

Reinsch, Paul S., *American Legislatures and Legislative Methods*, chaps. VIII, IX (Century, N. Y., 1913).

Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., chaps. XVIII, XIX (Scribners, N. Y., 1917).

Godkin, E. L., "Decline of Legislatures" in *Atlantic*, Vol. 80, pp. 35-53.

Holcombe, A. N., *State Government in the United States*, chap. X (Macmillan, N. Y., 1920).

O'Neal, Emmet, "Distrust of State Legislatures" in *No. Am.*, Vol. 199, pp. 684-99.

Orth, S. P., "Our State Legislatures" in *Atlantic*, Vol. 94, pp. 728-39.

II. History of Direct Popular Action.
Lobingier, C. S., *The People's Law,* chaps. I-XXVII (Macmillan, N. Y., 1909).

III. Its Actual Operation in Other Countries.
Lobingier, C. S., *The People's Law,* chaps. XXIX-XXXIII, (Macmillan, N. Y., 1909).
Horwill, H. W., "Referendum in Great Britain" in *Pol. Sci. Q.,* Vol. 26, pp. 415-31.
Ogg, F. A., *Governments of Europe,* Rev. ed., pp. 583-597 (Macmillan, N. Y., 1920).
Rappard, W. E., "Initiative, Referendum and Recall in Switzerland" in *Ann. Am. Acad.,* Vol. 43, pp. 110-45.
Ogg, F. A., *Social Progress in Contemporary Europe,* pp. 200-12 (Macmillan, N. Y., 1912).
Wuarin, Louis, "Recent Political Experiments in the Swiss Democracy" in *Ann. Am. Acad.,* Vol. 6, pp. 361-80.
Commons, John R., "Direct Legislation in Switzerland and America" in *Arena,* Vol. 22, pp. 725-39.
Hart, A. B., "Vox Populi in Switzerland" in *Nation,* Vol. 59, pp. 193-4.

IV. Its Actual Operation in the United States.
Lobingier, C. S., *The People's Law,* chaps. XXVII, XXVIII (Macmillan, N. Y., 1909).
Cleveland, F. A., *Organized Democracy,* chaps. XV, XXI-XXV (Longmans, Green, N. Y., 1913).
Barnett, J. D., *The Operation of the Initiative, Referendum and Recall in Oregon,* Part I (Macmillan, N. Y., 1915).
Beard, C. A., and Shultz, B. E., *Documents on the State-Wide Initiative, Referendum and Recall,* Parts I, III (Macmillan, N. Y., 1912).
Galbreath, C. B., *Initiative and Referendum* (Heer, Columbus, O., 1912).
Munro, W. B., *The Initiative, Referendum and Recall* (Appleton, N. Y., 1916).
Oberholtzer, E. P., *The Referendum in America* (Scribners, N. Y., 1912).
Taft, W. H., *Popular Government,* pp. 42-80 (Yale Univ. Press, New Haven, 1913).
Lowell, A. L., *Public Opinion and Popular Government,* chaps. X-XV (Longmans, Green, N. Y., 1913).
Parsons, Frank, *Direct Legislation; or The Veto Power in the Hands of the People* (C. F. Taylor, Philadelphia, 1900).
Bacon, Edwin Munroe, and Wyman, Merrill, *Direct Elections and Law-Making by Popular Vote* (Houghton, Mifflin, Boston, 1912).
Coker, F. W., "Interworkings of State Administration and Direct Legislation" in *Ann. Am. Acad.,* Vol. 64, pp. 122-33.
Dodd, W. F., "Some Considerations Upon the State-Wide Initiative and Referendum" in *Ann. Am. Acad.,* Vol. 43, pp. 203-15.
Bourne, J., Jr., "Functions of the Initiative, Referendum and Recall" in *Ann. Am. Acad.,* Vol. 43, pp. 3-16.
Kales, A. M., *Unpopular Government,* pp. 118-21 (Univ. of Chicago Press, Chicago, 1914).
Ford, H. J., "Initiative and the Referendum from the Standpoint of Political Science" in *Harp. W.,* Vol. 57, p. 8.

Guthrie, G. W., "Initiative, Referendum and Recall" in *Ann. Am. Acad.*, Vol. 43, pp. 17-31.
Smith, H. L., "Direct Legislation in California" in *Nation*, Vol. 93, p. 543.
Lowrie, S. G., "Initiative and Referendum: California" in *Am. Pol. Sci. R.*, Vol. 5, pp. 434-7.
Beard, C. A., *American Government and Politics*, 3rd ed., pp. 461-9 (Macmillan, N. Y., 1920).
Lowrie, S. G., "Initiative and Referendum" in *Am. Pol. Sci. R.*, Vol. 5, pp. 590-2.
Lowrie, S. G., "New Forms of the Initiative and Referendum" in *Am. Pol. Sci. R.*, Vol. 5, pp. 566-72.
Fairlie, J. A., "Referendum and Initiative in Michigan" in *Ann. Am. Acad.*, Vol. 43, pp. 146-58.
Lowrie, S. G., "Wisconsin Plan for the Initiative and Referendum" in *Ann. Am. Acad.*, Vol. 43, pp. 179-90.
Gardner, C. O., "Working of the State-Wide Referendum in Illinois" in *Am. Pol. Sci. R.*, Vol. 5, pp. 394-417.
Shippee, L. B., "Washington's First Experiment in Direct Legislation" in *Pol. Sci. Q.*, Vol. 30, pp. 235-53.
Black, J. W., "Maine's Experience with the Initiative and Referendum" in *Ann. Am. Acad.*, Vol. 43, pp. 159-78.
Haynes, G. H., "People's Rule in Municipal Affairs: Election in Portland, Oregon" in *Pol. Sci. Q.*, Vol. 26, pp. 432-42.
Haynes, G. H., "People's Rule on Trial: The Oregon Election, November 5, 1912," in *Pol. Sci. Q.*, Vol. 28, pp. 18-33.
Ray, P. O., *An introduction to Political Parties and Practical Politics*, Rev. ed., pp. 581-611 (Scribners, N. Y., 1917).
Jones, C. L., *Readings on Parties and Elections*, pp. 335-351 (Macmillan, N. Y., 1916).
Lowell, A. L., *Public Opinion and Popular Government*, pp. 252-253 (Longmans, Green, N. Y., 1913).
Boyle, James, *The Initiative and Referendum: Its Folly, Fallacies and Failures* (A. H. Smythe, Columbus, O., 1912).
Oberholtzer, E. P., *The Referendum in America* (Scribners, N. Y., 1912).
Cleveland, F. A., *Organized Democracy*, pp. 273-341 (Longmans, Green, N. Y., 1913).
Munro, W. B., *The Initiative, Referendum and Recall* (Appleton, N. Y., 1916).
Barnett, J. D., *The Operation of the Initiative, Referendum and Recall in Oregon* (Macmillan, N. Y., 1915).
Phelps, E. M., *Selected Articles on the Initiative and Referendum*, 3rd ed. (H. W. Wilson, White Plains, N. Y., 1914).
"The Initiative, Referendum and Recall," *Ann. Am. Acad.*, Vol. 43 (1912).

V. Arguments Pro and Con on the Initiative and Referendum.

Wilcox, D. F., *Government by All the People*, Parts II, III, V (Macmillan, N. Y., 1913).
Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., chap. XX (Scribners, N. Y., 1917).
"Taking the Referendum Seriously" in *New Republic*, Vol. 10, p. 92.
Macdonell, J., "Referendum versus Representative Government" in *Liv. Age*, Vol. 269, pp. 289-93.

McCall, S. W., "Representative as Against Direct Government" in *Atlantic*, Vol. 108, pp. 454-66.
Pomeroy, Eltweed, "Democratic *vs.* Aristocratic Government" in *Arena*, Vol. 28, pp. 119-24.
Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 570-581 (Scribners, N. Y., 1917).
Reinsch, Paul S., *American Legislatures and Legislative Methods* (Century, New York, 1913).
Holcombe, A. N., *State Government in the United States*, pp. 267-279 (Macmillan, N. Y., 1920).
Haines, Lynn, *Your Congress*, pp. 112-124 (National Voters' League, Washington, D. C., 1915).
McCarthy, C., "Remedies for Legislative Conditions" in *Proc. of Amer. Pol. Sci. Assoc.*, Vol. 6, pp. 80-102.
Stokes, A. P., Jr., "Pork Barrel Problem—a Suggested Solution" in *Harp. W.*, Vol. 57, p. 9.
Carter, C. F., "First Aid for Legislators" in *R. of R.*, Vol. 49, pp. 587-90.
Cushman, R. E., "Voters' Leagues and Their Work" in *Nat. Munic. R.*, Vol. 4, pp. 286-90.
Dudgeon, M. S., "The Wisconsin Legislative Library" in *Yale R.*, Vol. 16, pp. 288-95.
Freund, Ernst, "The Problem of Intelligent Legislation" in *Proc. of Am. Pol. Sci. Assoc.*, Vol. 4, pp. 69-79.
Beard, C. A., *American Government and Politics*, 3rd ed., pp. 540-546 (Macmillan, N. Y., 1920).

CHAPTER VII

Constitutional Restraints and Judicial Review

I. Development of American Constitutional Law.

Smith, M., "Development of American Constitutional Law" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 100-17.
Gettell, R. G., *Readings in Political Science*, pp. 282-304 (Ginn, N. Y., 1911).
Hamill, C. H., "Constitutional Chaos" in *Forum*, Vol. 48, pp. 45-60.
Garner, J. W., *Introduction to Political Science*, chap. XII (American Book, N. Y., 1910).
McLaughlin, A. C., *The Courts, the Constitution and Parties*, Chaps. IV, V (Univ. of Chicago Press, Chicago, 1912).

II. Theory of Constitutional Restraints.

Lindsay, S. M., "Constitutional Limitations on Government Powers" in *Proc. Acad. Pol. Sci.*, Vol. 5, pp. 355-9.
Goodnow, F. J., "The Adaptation of a Constitution to the Needs of a People" in *Proc. Acad. Pol. Sci.*, Vol. 5, pp. 27-38.
Dawson, M. M., "Discussion of Written Constitutions and Social Conditions" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 121-3.
Hamilton, A., *The Federalist*, nos. 78-79 (Putnam, N. Y., 1889).
McKelway, A. J., "Social Principles of the New State Constitutions" in *Survey*, Vol. 25, pp. 610-3.
Howe, F. C., "The Constitution and Public Opinion" in *Proc. Acad. Pol. Sci.*, Vol. 5, pp. 7-19.

Freund, E., "The Problem of Adequate Legislative Powers Under State Constitutions" in *Proc. Acad. Pol. Sci.*, Vol. 5, pp. 98-126.
Cleveland, F. A., *Organized Democracy*, chap. XXIX (Longmans, Green, N. Y., 1913).
Emery, L. A., *Concerning Justice*, chaps. VI, IX (Yale Univ. Press, New Haven, 1914).

III. Judicial Review.
Cooley, T. M., *A Treatise on the Constitutional Limitations*, 7th ed., chap. VII (Little, Brown, Boston, 1903).
Emery, L. A., *Concerning Justice*, chaps. VII, VIII (Yale Univ. Press, New Haven, 1914).
Beard, C. A., *The Supreme Court and the Constitution* (Macmillan, N. Y., 1912).
Haines, C. G., *The American Doctrine of Judicial Supremacy* (Macmillan, N. Y., 1914).
Corwin, E. S., *The Doctrine of Judicial Review*, chap. I (Princeton Univ. Press, Princeton, 1914).
McLaughlin, A. C., *The Courts, the Constitution and Parties*, chap. I (Univ. of Chicago Press, Chicago, 1912).

IV. Creation and Amendment of Constitution.
"The Amending of Constitutions" in *Nation*, Vol. 98, pp. 518-9.
Dodd, W. F., "Revision and Amendment of State Constitutions." Review in *Pol. Sci. Q.*, Vol. 26, pp. 729-31.
Seager, H. R., "Discussion of the Adaptation of Written Constitutions to Changing Economic and Social Conditions" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 118-20.
Garner, J. W., "Amendment of State Constitutions" in *Am. Pol. Sci. R.*, Vol. 1, pp. 213-47.
Bates, F. G., "Constitutional Amendments" in *Am. Pol. Sci. R.*, Vol. 8, pp. 445-51.

CHAPTER VIII

Recall of Judicial Decisions

Roosevelt, T., "The Bar Association and the Popular Review of Judicial Decisions" in *Outlook*, Vol. 101, pp. 1004-7.
Hamill, C. H., "Constitutional Chaos" in *Forum*, Vol. 48, pp. 45-60.
Richberg, D. R., "Constitutional Growth Through Recall of Decisions" in *Ann. Am. Acad.*, Vol. 52, pp. 25-36.
Lewis, W. D., "New Method of Constitutional Amendment by Popular Vote" in *Ann. Am. Acad.*, Vol. 43, pp. 311-25.
Roosevelt, T., "People and the Courts" in *Outlook*, Vol. 101, pp. 855-7.
Snow, A. H., "Position of the Judiciary in the United States" in *Ann. Am. Acad.*, Vol. 43, pp. 286-310.
Frederick, K. T., "Significance of the Recall of Judicial Decisions" in *Atlantic*, Vol. 110, pp. 46-52.
Dodd, W. F., "Social Legislation and the Courts" in *Pol. Sci. Q.*, Vol. 28, pp. 1-17.
Dodd, W. F., "To Amend the Federal Judicial Code" in *Nation*, Vol. 94, pp. 409-10.
Smith, M., "Development of American Constitutional Law" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 100-17.

Lewis, W. D., "New Method of Dealing with Constitutional Questions" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 85-95.
Ashley, C. D., "Recall of Judicial Decisions" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 96-9.
Beard, C. A., and Shultz, B. E., *Documents on the State-Wide Initiative, Referendum and Recall*, pp. 291-348 (Macmillan, N. Y., 1912).
Smalley, H. S., "Nullifying the Law by Judicial Interpretation" in *Atlantic*, Vol. 107, pp. 452-64.
Roosevelt, T., "Charter of Democracy" in *Outlook*, Vol. 100, pp. 390-402.
Roosevelt, T., "Right of the People to Rule" in *Outlook*, Vol. 100, pp. 618-26.
Taft, W. H., *Popular Government*, pp. 174-185 (Yale Univ. Press, New Haven, 1913).

CHAPTER IX

The Recall of Officers

I. The Recall in General.

Jones, C. L., *Readings on Parties and Elections*, pp. 351-4 (Macmillan, N. Y., 1916).
Guthrie, G. W., "Initiative, Referendum and Recall" in *Ann. Am. Acad.*, Vol. 43, pp. 17-31.
Kales, A. M., *Unpopular Government*, pp. 122-7 (Univ. of Chicago Press, Chicago, 1914).
Schaffner, M. A., "Initiative, Referendum and Recall: Recent Legislation in the United States" in *Am. Pol. Sci. R.*, Vol. 2, pp. 32-42.
Wilcox, D. F., *Government by All the People*, pp. 167-227 (Macmillan, N. Y., 1912).
Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 482-510 (Scribners, N. Y., 1917).
Beard, C. A., and Shultz, B. E., *Documents on the State-Wide Initiative, Referendum and Recall*, pp. 242-273 (Macmillan, N. Y., 1912).
Cleveland, F. A., *Organized Democracy*, pp. 400-413; 431-435 (Longmans, Green, N. Y., 1913).
Phelps, E. M., *Selected Articles on the Recall*, 2d ed. (H. W. Wilson, White Plains, N. Y., 1915).
Schaffner, M. A., *The Recall* (Wis. Free Library Com. Comparative Legislative Bulletin No. 12, 1907).
Woodburn, J. A., *American Politics, Political Parties and Party Problems in the United States*, 2d ed., pp. 449-456 (Putnam, N. Y., 1916).
Barnett, J. D., *The Operation of the Initiative, Referendum and Recall in Oregon*, pp. 191-218 (Macmillan, N. Y., 1915).
National Municipal Review, Vol. 1, pp. 204, 506, 659; Vol. 5, p. 380.
Hendrick, B. J., "The Recall in Seattle" in *McClure*, Vol. 37, pp. 647-63.

II. Recall of Political Officers.

"Recall of the Seattle Mayor" in *Survey*, Vol. 25, p. 879.
Catlett, F. W., "Working of the Recall in Seattle" in *Ann. Am. Acad.*, Vol. 43, pp. 227-36.

Beard, C. A., *American City Government*, pp. 68-75 (Century, N. Y., 1912).
Munro, W. B., *Government of American Cities*, 3rd ed., pp. 321-57 (Macmillan, N. Y., 1920).
"Folly of the Recall" in *Outlook*, Vol. 98, pp. 852-3.
Barnett, J. D., "Operation of the Recall in Oregon" in *Am. Pol. Sci. R.*, Vol. 6, pp. 41-53.
Gilbertson, H. S., "Popular Control Under the Recall" in *Ann. Am. Acad.*, Vol. 38, pp. 833-8.
Lowrie, S. G., "Recall in California" in *Am. Pol. Sci. R.*, Vol. 5, pp. 248-9.
Gilbertson, H. S., "Recall—its Provisions and Significance" in *Ann. Am. Acad.*, Vol. 43, pp. 216-26.
Taylor, C. F., "Recent Experience with the Initiative, Referendum and Recall" in *Proc. Acad. Pol. Sci.*, Vol. 5, pp, 89-97.
Wilcox, D. F., *Government by All the People*, pp. 177-211; 229-312 (Macmillan, N. Y., 1912).
Holt, L. H., *Introduction to the Study of Government*, pp. 149-151 (Macmillan, N. Y., 1915).
Reed, T. H., *Government for the People*, pp. 137-158 (Huebsch, N. Y., 1915).
Beard, C. A., and Shultz, B. E., *Documents on the State-Wide Initiative, Referendum and Recall*, pp. 242-290 (Macmillan, N. Y., 1912).
McCall, S. W., "Representative as Against Direct Government" in *Atlantic*, Vol. 108, pp. 61-5.
Butler, N. M., "Why Should We Change Our Form of Government?" in U. S. Senate Doc. 238 (62d Congress 2d Sess.).

III. Recall of Judges.

Roosevelt, T., "Arizona and the Recall of the Judiciary" in *Outlook*, Vol. 98, pp. 378-9.
Metcalf, J. A., "Dangers that Lurk in the Recall of the Judiciary" in *Ann. Am. Acad.*, Vol. 43, pp. 278-85.
Brown, R. G., "Judicial Recall—a Fallacy Repugnant to Constitutional Government" in *Ann. Am. Acad.*, Vol. 43, pp. 239-77.
"Recall of Judges a Rash Experiment" in *Century*, Vol. 82, p. 624-5.
Maxey, E., "Recall of the Judges" in *Forum*, Vol. 48, pp. 294-308.
"Delaying Statehood; the Veto for Timid Judges" in *R. of R.*, Vol. 44, pp. 264-6.
"Statehood Veto" in *Outlook*, Vol. 98, pp. 912-4.
Nichols, E. R., *Intercollegiate Debates*, Vol. 2, pp. 367-409 (Hinds, Noble & Eldridge, N. Y., 1912).
Roe, G. E., "Recall of Judges" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 141-6.
"Discussion of the Selection and Removal of Judges" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 157-64.
Dougherty, J. H., "Substitutes for the Recall of Judges" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 147-56.
Cleveland, F. A., *Organized Democracy*, pp. 431-434 (Longmans, Green, N. Y., 1913).
Ransom, Wm. L., *Majority Rule and the Judiciary* (Scribners, N. Y., 1912).

Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 376-386 (Scribners, N. Y., 1917).
Reed, T. H., *Government for the People*, pp. 171-176 (Huebsch, N. Y., 1915).
Owen, R. L., "Election and Recall of Federal Judges" in U. S. Senate Doc., No. 99 (62d Congress, 1st Sess.).
Overton, G., "Democracy and the Recall" in *Forum*, Vol. 47, pp. 157-68.
Page, E. D., "Selection and Removal of Judges" in *Proc. Acad. Pol. Sci.*, Vol. 3, pp. 163-4.

CHAPTER X

The Short Ballot and Popular Government

I. General References.
Childs, R. S., *Short Ballot Principles* (Houghton, Mifflin, Boston, 1911).
Nichols, E. R., *Intercollegiate Debates*, Vol. 2, pp. 319-60 (Hinds, Noble & Eldridge, N. Y., 1912).
Childs, R. S., "Ballot Reform; the Need of Simplification" in *Proc. Am. Pol. Sci. Assoc.*, Vol. 6, pp. 65-71.
Beard, C. A., "Tendencies Affecting the Size of the Ballot" in *Proc. Am. Pol. Sci. Assoc.*, Vol. 6, pp. 93-9.
Ludington, A. C., "Proposed Methods of Ballot Simplification" in *Proc. Am. Pol. Sci. Assoc.*, Vol. 6, pp. 72-92.
Danner, V. E., "Making Government Efficient" in *Forum*, Vol. 51, pp. 354-64.
Garvin, L. F. C., "Shortest Ballot" in *Independent*, Vol. 69, pp. 1152-5.
Childs, Richard S., "The Short Enough Ballot," in *Independent*, Vol. 69, p. 1316.
Thompson, B. M., "Are too Many Executive Officers Elective?" in *Mich. Law Rev.*, Vol. 6, pp. 228-37.
Wilson, Woodrow, "Hide-and-Seek Politics" in *No. Am. R.*, Vol. 191, pp. 585-601.
Allen, P. L., "Multifarious Australian Ballot" in *No. Am. R.*, Vol. 191, pp. 602-11.
Haskell, H. J., "Ineffective Voter" in *Outlook*, Vol. 93, p. 996.
Woodruff, C. R., "Complexity of American Governmental Methods" in *Pol. Sci. Q.*, Vol. 15, pp. 260-72.
Bullock, E. D., *Short Ballot* (H. W. Wilson, White Plains, N. Y., 1915).
Childs, Richard S., "Peanut Politics and the Short Ballot" in *Harp. W.*, Vol. 58, pp. 22-3.

II. Short Ballot in State Government.
Harger, C. M., "State Rule by Commission" in *Independent*, Vol. 74, pp. 757-9.
"Commission Government for States" in *Lit. Digest*, Vol. 46, pp. 934-5.
"Commission Government for States" in *Outlook*, Vol. 103, pp. 742-3.
Cleveland, F. A., "The Short Ballot and the New York Constitution" in *R. of R.*, Vol. 52, pp. 195-8.

III. County Government and the Short Ballot.

Cartwright, O. G., "Efficiency in County Government" in *Ann. Am. Acad.*, Vol. 41, pp. 193-203.

Gilbertson, H. S., "Elements of the County Problem" in *Ann. Am. Acad.*, Vol. 47, pp. 3-13.

Bailey, W. L., "County Community and its Government" in *Ann. Am. Acad.*, Vol. 47, pp. 14-25.

Childs, Richard S., "Theoretically Perfect County" in *Ann. Am. Acad.*, Vol. 47, pp. 274-8.

Gilbertson, H. S., "Discovery of the County Problem" in *R. of R.*, Vol. 46, pp. 604-8.

Gilbertson, H. S., "Commission Government and Paid Managers for Counties" in *Survey*, Vol. 31, p. 490.

IV. City Government and the Short Ballot.

Beard, Charles A., (ed.) *Loose Leaf Digest of Short Ballot Charters*, No. 683 (Short Ballot Organization, N. Y., 1912).

Deming, H. E., *Government of American Cities* (Putnam, N. Y., 1909).

Bradford, E. S., "Adoption of the City Manager Plan" in *"Commission Government and the City-Manager Plan,"* 2d ed., p. 871 (Amer. Acad. of Pol. and Soc. Sci., Phila., 1914).

Childs, Richard S., "Short Ballot and the Commission Plan" in *Ann. Am. Acad.*, Vol. 38, pp. 816-22.

Crosby, John, "Municipal Government Administered by a General Manager" in *Ann. Am. Acad.*, Vol. 38, pp. 877-83.

Silvernail, F. D., "The Lockport Proposal" in *Ann. Am. Acad.*, Vol. 38, pp. 884-7.

Upson, L. D., "City Manager Charter of Dayton," in *"Commission Government and the City-Manager Plan,"* 2d ed., pp. 862-70 (Amer. Acad. of Pol. and Soc. Sci. Phil., 1914).

"Boston Adopts the Short Ballot" in *Outlook*, Vol. 93, pp. 608-10.

Gilbertson, H. S., "Short Ballot in American Cities" in *R. of R.*, Vol. 45, pp. 82-5.

V. Election Defects and Reforms.

Ray, P. O., *An Introduction to Political Parties and Practical Politics*, Rev. ed., pp. 336-347 (Scribners, N. Y., 1917).

Jones, C. L., *Readings on Parties and Elections*, pp. 224-232 (Macmillan, N. Y., 1916).

Cleveland, F. A., *Organized Democracy*, pp. 265-272 (Longmans, Green, N. Y., 1913).

Ruppenthal, J. C., "Election Reforms" in *Ann. Am. Acad.*, Vol. 28, pp. 411-41.

Beard, C. A., "The Ballot's Burden" in *Pol. Sci. Q.*, Vol. 24, pp. 589-614.

INDEX

CITIZEN'S LIBRARY: ECONOMICS, POLITICS AND SOCIOLOGY

"This has already proven itself one of the most fruitful among the different 'libraries' of the sort, in yielding stimulating books upon the modern phases of economic and social science."—*Philadelphia Public Ledger.*

The Citizen's Library of Economics, Politics and Sociology—New Series

EDITED BY RICHARD T. ELY, PH. D., LL. D.
Professor of Economics in the University of Wisconsin

AMERICAN CITY, THE. A PROBLEM IN DEMOCRACY. By D. F. Wilcox.
CHILD PROBLEMS. By George B. Mangold.
COLONIAL ADMINISTRATION. By Paul S. Reinsch.
COLONIAL GOVERNMENT. By Paul S. Reinsch.
COMMISSION GOVERNMENT IN AMERICAN CITIES. By Ernest S. Bradford.
DEMOCRACY AND SOCIAL ETHICS. By Jane Addams.
ECONOMIC CRISES. By E. D. Jones.
EDUCATION AND INDUSTRIAL EVOLUTION. By Frank Tracy Carlton.
ELEMENTS OF SOCIOLOGY. By F. W. Blackmar.
ESSAYS ON THE MONETARY HISTORY OF THE UNITED STATES. By C. J. Bullock.
FOUNDATIONS OF SOCIOLOGY. By E. A. Ross.
GOVERNMENT IN SWITZERLAND. By John M. Vincent.
GREAT CITIES IN AMERICA: THEIR PROBLEMS AND THEIR GOVERNMENT. By Delos F. Wilcox.
HISTORY OF POLITICAL PARTIES IN THE UNITED STATES. By J. Macy.
INTERNATIONAL COMMERCIAL POLICIES. By G. M. Fisk.
INTRODUCTION TO BUSINESS ORGANIZATION. By S. E. Sparling.
INTRODUCTION TO THE STUDY OF AGRICULTURAL ECONOMICS. By H. C. Taylor.
IRRIGATION INSTITUTIONS. A DISCUSSION OF THE GROWTH OF IRRIGATED AGRICULTURE IN THE ARID WEST. By E. Mead.
MONEY: A STUDY OF THE THEORY OF THE MEDIUM OF EXCHANGE. By David Kinley.
MONOPOLIES AND TRUSTS. By R. T. Ely.
MUNICIPAL ENGINEERING AND SANITATION. By M. N. Baker.
NEWER IDEALS OF PEACE. By Jane Addams.
PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY, THE, IN THEIR RELATION TO CRIMINAL PROCEDURE. By M. Parmelee.
RAILWAY LEGISLATION IN THE UNITED STATES, By B. H. Meyer.
SOCIAL CONTROL: A SURVEY OF THE FOUNDATION OF ORDER. By E. A. Ross.
SOME ETHICAL GAINS THROUGH LEGISLATION. By Mrs. Florence Kelley.
SPIRIT OF AMERICAN GOVERNMENT, THE. By J. A. Smith.
STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY. By R. T. Ely.
WAGE-EARNING WOMEN. By Annie M. MacLean.
WORLD POLITICS. By Paul S. Reinsch.

Each volume 12mo, half leather, $1.25